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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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HOPP

QUESTIONS PRESENTED

1. Whether regulations promulgated under an express delegation from Congress, setting forth assumptions for calculating liability to a federal agency, determine the amount owed to the agency by a debtor in bankruptcy.

2. Whether a debtor's statutory liability for minimum funding contributions to a pension plan, incurred during the course of a bankruptcy, is a cost ordinarily incident to the debtor's business, and therefore an administrative expense of the estate.

RULE 14(b) STATEMENT

The parties in the court below were as follows:

Appellant: Pension Benefit Guaranty Corporation

Appellees: Reorganized CF&I Fabricators of Utah, Inc.
Colorado & Utah Land Company
Kansas Metals Company
Albuquerque Metals Company
Reorganized Pueblo Metals Company
Denver Metals Company
Reorganized Pueblo Railroad Service Company
Reorganized CF&I Fabricators of Colorado, Inc.
Reorganized CF&I Steel Corporation
The Reorganized Colorado & Wyoming Railway Company
Unsecured Creditors Committee
William J. Westmark
The United Steelworkers of America, AFL-CIO-CLC

The Pension Benefit Guaranty Corporation has no parent companies or nonwholly owned subsidiaries.

The name of the Unsecured Creditors Committee was added by clerical error to the caption in the court below. The Unsecured Creditors Committee was a party to the case in the bankruptcy court, but pursuant to the order of confirmation and plan of reorganization, the Reorganized Debtors are the successors in interest to the Unsecured Creditors Committee. The name of William J. Westmark, former trustee of the Colorado & Wyoming Railway Company, was also added by clerical error to the caption in the court below. He is not a party to the case and has no interest in this petition.

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PETITION FOR A WRIT OF CERTIORARI

The Pension Benefit Guaranty Corporation ("PBGC"), an agency of the United States,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 150 F.3d 1293. The order denying the petition for rehearing (Pet. App. 98a-99a) is unreported. The district court's initial opinion (Pet. App. 41a-55a), remanding the case to the bankruptcy court, is reported at

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[1] PBGC "has the power . . . to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). The Solicitor General has authorized the filing of this petition to the extent such authorization is required.

179 B.R. 704. The district court's second opinion (Pet. App. 18a-24a) is unreported. The bankruptcy court's initial opinion (Pet. App. 79a-97a) is unreported; a second opinion (Pet. App. 59a-78a) is reported at 16 Employee Benefits Cas. (BNA) 1362. A third opinion (Pet. App. 27a-40a), issued after the remand, is reported at 19 Employee Benefits Cas. (BNA) 2371.

JURISDICTION

The court of appeals entered judgment on August 3, 1998. It denied PBGC's petition for rehearing on October 26, 1998. On January 15, 1999, Justice Breyer extended the time to file a petition for certiorari to February 23, 1999. On February 16, 1999, Justice Breyer further extended the time to March 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutory provisions:

(1) Employee Retirement Income Security Act of 1974 ("ERISA"): 29 U.S.C. §§ 1082, 1144, 1301, 1362 (Pet. App. 100a, 126a, 130a, 136a); and

(2) Bankruptcy Code: 11 U.S.C. §§ 502, 503, 507, 1123 (Pet. App. 141a, 146a, 147a, 157a).

The case involves the following regulation: 29 C.F.R. pt. 2619 (copies lodged).[2]

STATEMENT OF THE CASE

PBGC, the federal agency that administers the nation's pension plan termination insurance system, seeks review

[2] The operative facts of this case generally took place between 1989 and 1992. Accordingly, statutory citations refer to the 1988 edition of the United States Code. Except as otherwise noted, references to the Code of Federal Regulations are to the July 1, 1992 edition.

of a decision with two significant rulings regarding the amount and priority in bankruptcy of an employer's liabilities to the agency. PBGC regularly asserts such claims in bankruptcy, because Congress established the agency to protect retirees of financially distressed companies. When an underfunded pension plan terminates, PBGC takes over the plan, pays guaranteed benefits to its participants, and then mitigates its losses through collections from the employer. In this case, as a result of Respondents' failure to fund their pension plan and the agency's obligation to pay guaranteed benefits, PBGC sustained a loss of nearly a quarter billion dollars. The court of appeals held that in determining the employer's termination liability—the shortfall between assets and benefit liabilities in a terminated pension plan—a bankruptcy court may disregard the statutory basis for calculating that liability. The court of appeals also held that the statutorily required cost of funding a pension plan during bankruptcy was not in its entirety an administrative expense entitled to priority. These issues—which constantly arise when PBGC seeks to recover from financially troubled companies—are of fundamental importance to the agency's program, and hence warrant this Court's review.

Statutory Background

Modeled after the Federal Deposit Insurance Corporation, PBGC provides a mandatory insurance program to protect participants of defined benefit pension plans. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990). PBGC and the insurance program were established by Title IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC is organized in corporate form, with a board of directors consisting of the Secretaries of Labor, Treasury, and Commerce. 29 U.S.C. § 1302(a), (d). PBGC is charged with (i) encouraging the continuation of private pension plans, (ii) providing for the payment of pension benefits to participants of terminated plans, and (iii) keeping employers' termination insurance premiums low. 29

U.S.C. § 1302(a). The agency protects 42 million workers in 45,000 pension plans sponsored by private employers. In 1997, PBGC paid $824 million in guaranteed benefits to 205,800 persons. No funds from general federal revenues are available to finance the agency's program operations. PBGC obtains its revenues exclusively from four sources: (i) premiums paid by employers, (ii) investment income, (iii) assets of terminated plans, and (iv) recoveries from employers whose underfunded plans have terminated. 1997 PBGC Ann. Rep. i, 1.

An employer's decision to establish a pension plan is purely voluntary. Once a plan is established, however, it must be funded in accordance with parallel provisions of ERISA and the Internal Revenue Code ("I.R.C."). 29 U.S.C. § 1082; 26 U.S.C. § 412. This annual obligation, payable in quarterly installments, arises under what is termed the "minimum funding standard." It is exactly that—a minimum sum that the employer must contribute to the plan after the plan's enrolled actuary determines the amount in accordance with the statute. The minimum funding standard applies until the plan is terminated. Rev. Rul. 79-237, 1979-2 C.B. 190. If the employer is delinquent in funding, a statutory lien arises in favor of the plan on the 60th day after unpaid contributions first exceed $1 million. 26 U.S.C. § 412(n). This lien, enforceable by PBGC, is imposed in favor of the plan on all property of the employer and its "controlled group."[3] 26 U.S.C. § 412(n)(1), (5). After taking over a terminated plan, PBGC may collect on behalf of the plan any amounts due the plan, including any unpaid minimum funding contributions. 29 U.S.C. §§ 1342(d)(1)(B)(ii), 1362(c).

Title IV of ERISA sets forth the exclusive means of terminating a pension plan. 29 U.S.C. § 1341(a)(1);

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[3] The "controlled group" may include affiliates such as a parent corporation, subsidiary, or brother-sister company. *See* 26 U.S.C. §§ 412(n)(6)(B), 414(b), (c).

Hughes Aircraft Co. v. Jacobson, 119 S. Ct. 755, 764 (1999). An employer may terminate a plan in a "standard" termination if the plan has sufficient assets to cover the future benefits of all participants and their survivors. 29 U.S.C. § 1341(b). In practice, this is generally done by the employer's purchase of annuities from a private insurer. An underfunded plan may terminate only if the employer and each member of its "controlled group" demonstrate that they are in financial "distress." 29 U.S.C. §§ 1301(a)(14), 1341(c). The agency is obligated to terminate a plan "involuntarily" if the plan runs out of money to pay benefits currently due. PBGC may also terminate a plan involuntarily if it determines that (i) the plan will be unable to pay benefits when due in the future, (ii) the employer failed to satisfy the statutory minimum funding standard, or (iii) the risk of long-run loss to the insurance program may increase unreasonably if the plan is not terminated. *See* 29 U.S.C. § 1342(a).

When a plan terminates with insufficient assets to pay promised benefits, PBGC takes over the assets and liabilities of the plan and pays benefits to participants and their beneficiaries. 29 U.S.C. §§ 1342(c), (d), 1361. The guaranteed amount is subject to statutory limits. 29 U.S.C. § 1322. At plan termination, the statute gives the agency a one-time claim against the employer and its controlled group for the shortfall. 29 U.S.C. § 1362(a), (b). In 1987, Congress defined the amount of this termination liability as the "total amount of the unfunded benefit liabilities (as of the termination date)." 29 U.S.C. § 1362(b)(1)(A). To determine the "amount" of a plan's unfunded benefit liabilities, the "value" of the plan's assets is subtracted from the "value" of its benefit liabilities. 29 U.S.C. § 1301(a)(18). The latter provision, also added in 1987, directs that the "value" of the plan's benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]." *Id.* In particular, Congress mandated that the assumptions used to determine the value of benefit liabilities under terminated pension plans be the

same ones used "for purposes of section 1344 of this title."[4] *Id.* In 1987, the agency already had in force a regulation under 29 U.S.C. § 1344 for valuing plan liabilities.[5] Published in final form in 1981, the regulation produces a value of benefit liabilities in line with prices of insurance company annuity contracts. It does so by using linked assumptions about mortality and interest.[6]

Facts

CF&I Steel Corporation ("CF&I") was the sponsor and administrator of a significantly underfunded pension plan. In 1990, CF&I ceased making the minimum funding contributions to its plan required by ERISA and the I.R.C. Yet CF&I took none of the legally required steps to terminate the plan voluntarily and thereby end contribution accruals. In September and October 1990, CF&I failed to pay $14 million in required contributions. On November 7, 1990—eight days before expiration of the 60-day period after which PBGC could have perfected a lien under 26 U.S.C. § 412(n)—CF&I and its nine wholly-owned subsidiaries (collectively "Debtors") filed petitions under Chapter 11 of the Bankruptcy Code. According to Debtors, the "immediate cause" of their bankruptcy filings was "an inability to fund these required pension funding payments." C.A. Aplt. App. 76-77.

During the reorganization proceeding, Debtors continued to operate their businesses as debtors-in-possession. They

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[4] Section 1344 was enacted in 1974. It governs the allocation of a terminating plan's assets to its benefit liabilities so that a determination can be made whether the assets are sufficient to cover the benefits. *See generally Mead Corp. v. Tilley*, 490 U.S. 714, 717-18, 723 (1989).

[5] Valuation of Plan Benefits in Non-Multi-Employer Plans, 46 Fed. Reg. 9492 (1981), *codified at* 29 C.F.R. pt. 2619 (1992). The regulation was amended in 1993 without change to its basic approach, and later recodified at 29 C.F.R. §§ 4044.41-.75 (1998).

[6] 45 Fed. Reg. 38,415, 38,416 (1980).

made substantial contributions (for example, $10 million in 1991 alone) to employee health and life insurance plans that were not insured by PBGC. C.A. Aplt. App. 75. By contrast, Debtors made no contributions whatsoever to the pension plan during bankruptcy, for which PBGC asserted administrative priority claims of over $37 million. As a result of Debtors' failure to contribute, the pension plan's assets were steadily depleted. Finally, on March 19, 1992, the agency involuntarily terminated the plan and became its statutory trustee.

In late 1992, the major parties, including PBGC, negotiated a consensual plan of reorganization. It provided that certain funds would be set aside in a reserve (the "Appeal Funds") pending final resolution of specific PBGC claim issues. If the agency prevails on both issues presented, its additional recovery is limited to roughly $6 million and a "contingent value right" of speculative value. *See* C.A. Aplt. App. 61-64. On March 3, 1993, pursuant to Debtors' reorganization plan, Debtors' operating assets were sold to an unrelated buyer, which continued the business. Debtors then commenced an orderly liquidation.

Initial Proceedings

The agency filed proofs of claim against each of the Debtors for both the termination liability and the unpaid contributions. Debtors objected to both the amounts and priorities asserted. In 1992, the bankruptcy court issued an interlocutory decision on the threshold legal issues. The bankruptcy court rejected PBGC's argument that the entire amount of the postpetition contribution claim was entitled to administrative priority. In the bankruptcy court's view, only the portion of the contributions that it deemed attributable to the postpetition labor of Debtors' employees was entitled to administrative priority. Pet. App. 91a. The court later determined that the amount entitled to administrative priority was $1,565,198. Pet. App. 68a. As for the claim for termination liability, the bankruptcy court declined to hold as a matter of law that

the amount of liability was governed by the statutory provision directing that such liability be calculated on the basis of assumptions prescribed by PBGC. Declaring that it would merely afford "due deference" and "substantial weight" to PBGC's regulation prescribing the assumptions, the bankruptcy court ordered an evidentiary hearing. Pet. App. 88a-89a. After a three-day trial consisting largely of expert testimony, the bankruptcy court rejected CF&I's two hypothetical valuation methods—the so-called "debtor specific" and "prudent investor" approaches—and held that the allowed amount of the claim should be determined in accordance with PBGC's regulation. Pet. App. 75a. In its final order, the bankruptcy court treated this liability as an allowed general unsecured claim in the amount sought here by PBGC, $220,953,000. Pet. App. 57a.

The district court affirmed in part and reversed in part. It affirmed the bankruptcy court's ruling denying priority to all but a small portion of the postpetition contribution claim. Pet. App. 47a-48a. The district court reversed as to the amount of the termination liability claim. Concluding that "ERISA and the Bankruptcy Code conflict," the district court held that the claim must be "determined according to bankruptcy law" and the "overriding policy goals embodied in the Bankruptcy Code." It ordered an "independent discount rate determination without any deference to the position of PBGC." Pet. App. 51a-52a, 55a.

On remand, the parties filed cross-motions for judgment based on the existing trial record. The bankruptcy court then reversed itself, this time adopting the "prudent investor" method that it had previously rejected on the same evidentiary record. In contrast to PBGC's approach under the statute—replicating the market price for insurance company annuity contracts that would otherwise be purchased upon termination—Debtors' method purports to measure rates of return on a hypothetical portfolio of assets held by an ongoing pension plan. Pet. App. 39a. The bankruptcy court ordered the agency's claim to be "revalued utilizing a 12.3% discount rate . . . ." Pet.

App. 39a-40a. A few weeks later, the bankruptcy court entered a final order allowing the claim in the amount of $122,528,000. Pet. App. 26a. The district court affirmed. Fearing that application of the regulation might give the agency a "windfall," the district court concluded that CF&I's "prudent investor" rate was the "only rate in evidence compatible with the Bankruptcy Code." Pet. App. 22a-23a.

The Decision of the Court of Appeals

The court of appeals affirmed the bankruptcy court's reduction of PBGC's termination liability claim from $221 million to $123 million. Acknowledging that the amount of an employer's termination liability was expressly defined by ERISA and "valid in other contexts," the court nevertheless concluded that ERISA's definitions "cannot extend to bankruptcy." The court recognized that the agency's regulation has the "force of law," but expressed "no doubt of its inapplicability in the world of bankruptcy." In its view, "[n]othing in the ERISA sections relied upon by PBGC implies a carry-over into the realm of bankruptcy to allow PBGC to set its own valuation methodology." According to the court, applying PBGC's regulation implementing the statute would violate a "cardinal rule" that "all claims within the same class must be treated alike." Perceiving a "conflict" between ERISA and the Bankruptcy Code, the court displaced the statutory measure of the amount of liability with CF&I's "prudent investor" method. Although this case concerns Title IV of ERISA, the court relied on a provision limited to Title I of ERISA for the proposition that, "Congress has made clear when ERISA conflicts with another provision of federal law, ERISA must be subordinated." Pet. App. 15a.

The court of appeals also ruled against the agency on its claim for unpaid contributions mandated by the minimum funding standard. The court acknowledged that an employer "must meet the minimum funding standards

prescribed in the Internal Revenue Code (IRC) and ERISA." It further recognized that "the employer must meet these standards until its plan is terminated . . . ." Pet. App. 3a. The court refused, however, to accord the entire postpetition claim for unpaid contributions administrative priority as a cost ordinarily incident to a debtor's business under *Reading Co. v. Brown,* 391 U.S. 471 (1968). Notwithstanding the statutory source of the obligation, the court treated the duty to fund the pension plan as "contractual." Pet. App. 11a. The court acknowledged that CF&I did not seek voluntary termination of its plan before or during bankruptcy. Pet. App. 3a. Nonetheless, the court viewed all but a small portion of the postpetition contribution claim as relating back to the prepetition labor of Debtors' employees. Pet. App. 12a n.5.[7]

REASONS FOR GRANTING THE PETITION

This case presents two recurring questions of vital importance in the administration of Title IV of ERISA. The first concerns the amount of an employer's termination liability to PBGC when the agency takes over an underfunded pension plan from a bankrupt employer. In particular, the issue is whether PBGC and the public may rely on published regulatory assumptions, explicitly provided for by statute, or whether bankruptcy courts are free to devise their own methods of calculating liability to the agency. It is essential for the agency, financially troubled companies, their creditors, and plan participants to know whether the statutory mechanism for calculating termination liability applies, or whether a different set of rules takes effect once a company enters bankruptcy. By permitting firms that declare bankruptcy to reduce their termination liability, the decision gives employers with underfunded plans an incentive to terminate them in bank-

[7] The court of appeals also rejected PBGC's alternative claim of tax priority for the minimum funding contributions. Pet. App. 5a-9a. The agency has elected not to seek this Court's review of that issue.

ruptcy. In displacing a federal regulation that the court of appeals acknowledged to have the "force of law," the decision calls into question fundamental doctrines of administrative law. By disregarding expressly delegated rulemaking authority, the court held that ERISA is "subordinated" to the Bankruptcy Code. Because of its implications for regulatory jurisprudence, this holding raises a question of exceptional public importance.

The second question presented is whether minimum funding contributions to a pension plan that accrue during a debtor's bankruptcy are, in their entirety, administrative expenses of the estate. The court of appeals acknowledged that "the employer must meet these [pension funding] standards until its plan is terminated . . . ." Pet. App. 3a. Yet it declined to treat this current, statutory obligation as a cost incident to the operation of Debtors' business entitled to administrative priority. The court of appeals decision seriously hinders enforcement of the funding provisions of ERISA and the I.R.C. And, like the court's ruling on termination liability, it opens the door to abuse. Unless pension contributions are placed on the same footing as other regulatory costs incurred by a debtor, and accorded administrative priority, companies will have little or no incentive to continue funding while in bankruptcy. By failing to comply with the funding standard and forcing PBGC to terminate their underfunded plans—as CF&I did here—debtors can shift large portions of their pension liabilities to the agency, and ultimately to other employers whose premiums support the system.

I. THE DECISION BELOW UNDERMINES THE FEDERAL PENSION INSURANCE SYSTEM.

A. The Decision Jeopardizes PBGC's Regulatory Authority, Threatening the Continuation and Funding of Pension Plans of Distressed Companies.

In *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980)—this Court's first case involving Title IV of ERISA and PBGC—the Court declared:

> One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid when pension plans are terminated. . . . The termination insurance program is a major part of Congress' response to the problem. Congress provided for a minimum funding schedule and prescribed standards of conduct for plan administrators to make as certain as possible that pension fund assets would be adequate. But if a plan nonetheless terminates without sufficient assets to pay all vested benefits, the PBGC is required to pay them—within certain dollar limitations not applicable here—from funds established by that corporation.

Id. at 374-75 (footnotes omitted). The court of appeals decision deals a double blow to the integrity of the termination insurance program. By holding that the statutory mechanism for calculating termination liability does not extend to firms in bankruptcy, and by denying administrative priority to all but a small portion of minimum funding contributions, the decision cripples the agency's ability to enforce the statutory scheme where pension plans are most at risk—among distressed companies.

When an underfunded pension plan terminates, PBGC collects from the employer and its controlled group—to the extent possible—the amount of the shortfall. Collecting from employers who can make some payment assures that companies do not receive a "free ride" from the in-

surance system. It brings a measure of fairness to premium payers that continue their plans. It deters employers from making improvident pension promises, which in turn reduces the "moral hazard" of the insurance program.[8] It aligns a firm's major creditors with that objective. And it provides a source of funding for PBGC's operations.

Recognizing the vital regulatory role of termination liability, Congress provided strong protection for the agency's claim. It explicitly provided that the assumptions used to calculate the claim be those prescribed by the agency. 29 U.S.C. § 1301(a)(18). By mandating use of these assumptions against the backdrop of a specific, preexisting regulation, *see supra* pp. 5-6 and note 5, Congress effectively ratified the regulatory valuation method. *See Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 561 (1991). And, as shown in the language of several statutory provisions, Congress plainly contemplated that Title IV of ERISA would operate in bankruptcy. *See, e.g.*, 29 U.S.C. §§ 1341(c)(2)(B)(i), (ii), 1342(e) (permitting plan termination during bankruptcy proceedings). The court of appeals decision recognizes PBGC's regulation as valid outside bankruptcy, but rejects it in determining the amount of bankruptcy claims. This holding has enormous practical importance for PBGC, because in the great majority of cases, the agency collects termination liability in bankruptcy proceedings. Typically the sponsors of terminating underfunded plans are either liquidating or attempting to reorganize in bankruptcy. *See id.*

The importance of bankruptcy cases to the agency's operations is borne out by experience. During the period from 1975-97, termination of 2,500 underfunded plans resulted in total liabilities against the PBGC insurance fund of $5.8 billion. Most of the liabilities arose from the bankruptcies of plan sponsors. The ten largest plan termi-

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[8] *See* GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving, but Long-Term Risks Remain 17-18 (1998) [hereinafter GAO Report].

nations accounted for $3.1 billion, or 54%, of the total liabilities. Among the ten largest terminations, eight involved bankruptcies. They accounted for $2.8 billion of the liabilities. *See* PBGC, Pension Insurance Data Book 1997 10, 12-13, tab. B-2 (1998). A recent congressional report on PBGC's financial status warned:

> [A] few pension plans with extremely large unfunded liabilities have dominated PBGC's past claims . . . . PBGC's losses with respect to future terminations will depend on how well companies fund their plans, and on the PBGC's position in bankruptcy proceedings. Finally, pending litigation could have a material impact on the financial condition of the PBGC.[9]

By ignoring a congressional direction to use the agency's valuation method, the decision below eviscerates a regulation in exactly the situation in which it is most needed—bankruptcy. The "world of bankruptcy"—to which the court of appeals ostensibly limited its holding—is the main world in which the PBGC insurance fund operates.

The decision disturbs the statutory scheme at several levels. Most important, it creates perverse economic incentives. The court's ruling permits a resistant debtor to cut the agency's termination liability claim to a fraction of its amount outside bankruptcy, even before PBGC's recovery is cut by the pro rata distribution to all unsecured creditors. A "prudent investor" approach similar to the one adopted here has been applied against the agency in three cases litigated to a decision.[10] Against CF&I,

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[9] Staff of House Comm. on Ways and Means, 105th Cong., 2d Sess., 1998 Green Book: Background Materials and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means 915 (Comm. Print 1998).

[10] The two other cases are (i) *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R. 690, 695-96 (S.D.N.Y. 1991), *and* 126 B.R. 165 (Bankr. S.D.N.Y. 1991), *vacated by consent order*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993); and (ii) *Belfance v. PBGC (In re CSC Industries, Inc.)*, No. 95-4103 (Bankr.

PBGC's termination liability claim was sliced from $221 million to $123 million. In *LTV*, the bankruptcy court's ruling would have effectively reduced the agency's claim from $222 million to about $158 million.[11] And in an extreme example, *CSC Industries*, the debtor's theory slashed the claim from $48 million to only $2 million. Also revealing is the effect that a "prudent investor" approach would have had on PBGC's claims in the eight bankruptcies among the ten largest terminations. Using CF&I's 12.3% "discount rate," the resulting aggregate bankruptcy claims would have been nearly halved from $2.8 billion to about $1.5 billion. But at the same time that PBGC's claim against a bankrupt company is reduced, the agency's liability for lifetime guaranteed benefits to participants and their survivors remains the same.

In bestowing more favorable treatment on companies that declare bankruptcy than those who do not, the decision gives employers with large underfunded pension plans a powerful incentive to terminate them in bankruptcy—here equal to a $100 million cut in liability. Another perverse result is that PBGC's claim against a bankrupt controlled-group member may be substantially less than its claim against a nonbankrupt member of the same controlled group—even though Congress expressly provided that the liability is "joint and several." 29 U.S.C. § 1362(a). Such disparities not only produce an unfair double standard, but offer an inducement for solvent companies to enter bankruptcy. The decision also provides a financial reason for PBGC to terminate plans *before* firms declare bankruptcy. Although ERISA encourages the continuation of plans wherever possible, *see* 29 U.S.C. § 1302(a)(1), an employer's entry into bankruptcy may

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N.D. Ohio Dec. 3, 1997), *appeal docketed*, No. 4:99CV00041 (N.D. Ohio Jan. 8, 1999).

11 As is typical, to facilitate the reorganization, this litigation was ultimately settled. It involved an LTV pension plan that was not among the three plans involved in the restoration dispute decided by this Court. *See* 496 U.S. at 640.

increase PBGC's long-run loss unreasonably, *see* 29 U.S.C. § 1342(a)(4)—forcing the agency to terminate plans. At termination, active employees cease accruing service credit, and all participants lose benefits exceeding PBGC's guarantee. GAO Report 18-19.

The decision also means that the agency's regulation no longer serves as a uniform benchmark of a plan's benefit liabilities in all circumstances. PBGC assumptions have historically been used to assess plan solvency in over 100,000 terminations. C.A. Aplt. App. 156. By providing a predictable measure of the cost of plan termination, the regulation has conveyed needed information to a variety of interested parties—the agency, employers, employees, creditors, and buyers and sellers of businesses. In displacing this uniform benchmark with a battle of experts, the decision promotes uncertainty and increases burdens on the courts.

The court of appeals' second ruling—denying priority to the bulk of the minimum funding contributions that accrue postpetition, *see* 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1)—also undermines the insurance system. It leaves pension authorities no effective remedy to enforce the minimum funding standard in bankruptcy. This result is inconsistent with Congress's original design, and with later legislative measures to strengthen funding.[12] When ERISA was enacted, one of the principal Senate sponsors explained: "The termination insurance program is intended to work hand in hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans."[13] *See also Nachman,* 446 U.S. at 375.

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[12] *See, e.g.*, H.R. Rep. No. 100-391(II), at 984 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-378, 2313-601 (discussing 1987 amendments requiring, among other things, more rapid funding for certain plans).

[13] 120 Cong. Rec. 29,953 (1974) (Sen. Nelson).

By holding that only part of the annual funding obligation is entitled to priority, the court of appeals' decision cuts away the core of the minimum funding rules. As the dissenting judge in a similar Sixth Circuit case pointed out:

> Selective payment of minimum contributions, which implies that only a part of the entire requirement is the truly "actual and necessary" cost of preserving the estate, is impermissible because participation in ERISA is an all-or-nothing proposition: once an employer chooses to participate, it must pay all accumulated minimum funding obligations.

PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 822 (6th Cir. 1997) (Kennedy, J., dissenting). Like the ruling on termination liability, this portion of the decision creates a double standard favoring debtors in bankruptcy. It leaves debtors with underfunded plans little or no incentive to comply with the minimum funding standard. As the debtor operates in bankruptcy, its active employees earn additional service credit under the plan, while retirees continue to receive monthly benefits. The growing deficiency in the plan will be covered by PBGC's insurance program, while most of the liability for accrued contributions will be treated as a general unsecured claim and paid by the estate at cents on the dollar. The deterioration of the plan in turn forces the difficult decision on PBGC whether to terminate the plan involuntarily to avoid the risk that its long-run loss may increase unreasonably. *See* 29 U.S.C. § 1342(a)(4). Thus, the employer's failure to pay current obligations may also force the agency to terminate plans, even where termination may not be essential to a successful reorganization.

Administrative expense treatment for the funding obligation is particularly important because other statutory enforcement tools are ineffective in bankruptcy. For example, when any unpaid contributions exceed $1 million, a statutory lien enforceable by PBGC arises against all property of the employer and its controlled group. 26

U.S.C. § 412(n). When an employer is not in bankruptcy PBGC can perfect the lien. This is a powerful incentive to comply with the funding standard. By contrast, if a debtor in bankruptcy fails to fund its plan, the automatic stay bars PBGC from perfecting any lien. *See* 11 U.S.C. § 362. Another strong statutory remedy against employers outside bankruptcy is 26 U.S.C. § 4971, which imposes an initial tax of 10% (and a second-tier tax of 100%) on any "accumulated funding deficiency" under a plan. If an employer files for bankruptcy, however, the section 4971 exaction is treated not as an "excise tax" under 11 U.S.C. § 507(a)(7)(E), but as a general unsecured claim. *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 226 (1996).

In summary, the decision deprives the agency of its most significant claims in the most important arena in which they are needed—bankruptcy. By offering bargain-basement terminations, it distorts incentives under ERISA, a carefully wrought congressional scheme. The court's short-sighted view of this "comprehensive and reticulated statute," *Nachman*, 446 U.S. at 361, exposes PBGC to greater risk, especially from the largest underfunded plans. By displacing the statutory mechanism and PBGC's regulation, the decision creates potential for "gaming" the system, and promotes endless litigation over the amount of termination liability. In denying priority to all but a small portion of minimum funding contributions, it encourages employers to shun their statutory obligations even as plan liabilities continue to mount. It may induce plan terminations, contrary to one of the stated purposes of ERISA. In short, the issues presented go to the heart of the agency's mission.

B. Immediate Review of These Issues Is Important to the Agency's Ability to Carry Out Its Mission.

The issues presented have major implications for this self-financing program. Although PBGC's single-employer program posted an overall surplus for the last two reported years, 1996 and 1997, it suffered deficits in *all* the preceding 21 years. *See* 1997 PBGC Ann. Rep. 1; 1996 PBGC Ann. Rep. 1. In October 1998, the General Accounting Office concluded:

> While PBGC's financial condition has significantly improved, risks to the long-term financial viability of the insurance programs remain. Continued underfunding among some large plans poses a risk to the agency. PBGC also remains vulnerable to other risks, such as downturns in the economy, problems in certain economic sectors, and declines in interest rates. An economic downturn and the termination of a few plans with large unfunded liabilities could quickly reduce or eliminate PBGC's surplus.

GAO Report 23. At any given time, PBGC is a party in hundreds of bankruptcies. In 1998, a year when the economy was strong, PBGC had at stake in bankruptcy about $2.4 billion in termination liability claims, and about $300 million in minimum funding contribution claims. In a recession, the agency's exposure could be many times larger. It is important, therefore, to resolve these fundamental issues.

The impact of the decision below extends far beyond the realm of litigated cases. The exigencies of bankruptcy practice put intense pressure on PBGC to compromise claims. Because government agencies are perceived in bankruptcy as the parties most able to withstand loss, their claims are often targeted in litigation. Furthermore, the pressure to settle claims is great when all major parties and the bankruptcy court insist that a successful reorganization is at stake. Like any major creditor, PBGC has an interest in seeing a productive business remain ongoing.

In addition, PBGC must weigh its Title IV responsibilities to plan participants and premium payers. Given the impossibility of litigating every dispute, the agency is under increasing pressure to give ground in negotiation.

Even when bankruptcy court disputes are pressed to a decision, obtaining effective appellate review is difficult. Once the plan of reorganization is confirmed, the property of the estate is distributed, and appeals are rendered moot unless the parties have agreed to establish a litigation reserve. Negotiating a litigation reserve to preclude mootness problems on appeal is itself a complex undertaking, and not always feasible. Bankruptcy court decisions must pass through two appellate stages before reaching this Court. In this case, that journey required six years. Thus, for a number of practical reasons, a circuit split is unlikely to develop for many years.

On the issue involving termination liability, there have been three decisions adverse to the agency, each within a different circuit, with an appeal pending in one other case. *See supra* p. 14 and note 10. On the priority of minimum funding contributions, the decisions are more mixed, with several recent losses balanced by some favorable early case law and an eloquent Sixth Circuit dissent.[14] One court ob-

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[14] *Compare Sunarhauserman*, 126 F.3d at 816-19; *LTV Corp. v. PBGC*, 130 B.R. at 696-97; *CSC Industries*, *supra* note 10; *In re Bayly Corp.*, No. 90-18983 (Bankr. D. Colo. Apr. 13, 1995), *aff'd on other grounds*, 163 F.3d 1205 (10th Cir. 1998); *In re Kent Plastics Corp.*, 183 B.R. 841, 847-48 (Bankr. S.D. Ind. 1995); *and In re Finley, Kumble, Wagner, Heine, Underburg, Manley, Myerson & Casey*, 160 B.R. 882, 888-93 (Bankr. S.D.N.Y. 1993), *with Columbia Packing Co. v. PBGC*, 81 B.R. 205, 208-09 (D. Mass. 1988), *and Sunarhauserman*, 126 F.3d at 821-23 (Kennedy, J., dissenting). *See also PBGC v. LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989) (dictum), *rev'd on other grounds*, 496 U.S. at 656; *Wyle v. Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476, 479-80 (9th Cir. 1983).

served: "ERISA's goals in the bankruptcy forum has led to considerable confusion and has been the source of scholarly debate, congressional discussion, and judicial review. The PBGC's assertion that it is entitled to administrative priority has been strenuously contested nationwide." *Kent Plastics*, 183 B.R. at 844.

This case is an excellent vehicle for resolving both of these important, recurring issues. The facts are reflected in a fully developed record. The court of appeals' holding on the purported conflict of major statutory schemes presents the issues squarely. In short, this case is well postured for this Court's review. *See PBGC v. LTV* Corp., 496 U.S. 633, 644 (1990) (certiorari granted because of "the importance of the PBGC's insurance program").

II. THE DECISION BELOW IS INCONSISTENT WITH RECOGNIZED PRECEPTS OF STATUTORY INTERPRETATION, ADMINISTRATIVE LAW, AND BANKRUPTCY LAW.

A. The Amount of the Agency's Claim for Termination Liability Should Be Determined in Accordance with Substantive Nonbankruptcy Law.

The court of appeals decided that regulations duly promulgated under an express statutory grant for purposes of computing liability to an agency will not determine the amount owed by a debtor in bankruptcy. This is an important issue that has never been addressed by this Court. Despite the absence of direct precedent, however, the court of appeals' reasoning departs from prior teachings of this Court. The court of appeals purported to find a conflict between ERISA and the Bankruptcy Code and found the latter overriding. On the contrary, the pension laws and the bankruptcy laws can and should be read to be consistent. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly

expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990). The court of appeals also ignored other decisions of this Court offering a harmonious resolution. For example, in examining the discharge provisions of the Bankruptcy Code, this Court noted that nonbankruptcy law determines the validity of claims in bankruptcy. *Grogan v. Garner*, 498 U.S. 279, 283 n.9 (1991). Nonbankruptcy law includes ERISA. *Patterson v. Shumate*, 504 U.S. 753, 758-59 (1992). Thus, the court of appeals should have held that, although the Bankruptcy Code determines the distribution on PBGC's claim, the amount of the claim is determined by ERISA. There is no reason these two bodies of law cannot "comfortably coexist in the bankruptcy context." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995).

At the same time, the decision departs from established doctrines of administrative law. Congress mandated use of a specific regulatory approach to calculate the amount of liability under ERISA. "In a situation of this kind, Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton v. Francis*, 432 U.S. 416, 425 (1977). *Accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Such express delegations give rise to legislative rules that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton*, 432 U.S. at 425 & n.9. CF&I never challenged PBGC's regulation under the Administrative Procedure Act—that is, whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The lower courts' resort to a battle of

experts in lieu of applying the agency's regulation circumvents an express congressional direction. An agency should not be compelled " 'continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.' " *Mobil Oil Explor. & Prod. Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 228 (1991) (quoting *Heckler v. Campbell*, 461 U.S. 458, 467 (1983)). The decision is also in tension with *LTV* in that it subordinates basic tenets of administrative law to the generalized policies and goals of the Bankruptcy Code. *See* 496 U.S. at 645-47.

The court of appeals justified its result by reasoning that two important federal statutory schemes—ERISA and the Bankruptcy Code—are in conflict, and that the pension laws must be subordinated to the bankruptcy laws. Pet. App. 2a, 15a. The court was wrong. The Code provides that the bankruptcy court is to "determine the amount of [a] claim." 11 U.S.C. § 502(b). For claims allowance purposes, bankruptcy courts generally apply the substantive nonbankruptcy law that gives rise to a liability in determining the amount of a claim. *See, e.g., Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433, 436-39 & n.7 (6th Cir. 1982) (Bankruptcy Act case). *Accord* 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 502.03[1][a] (15th rev. ed. 1998). Putting it another way, bankruptcy law takes the parties' substantive rights as it finds them unless the Bankruptcy Code specifically provides otherwise.[15] This conclusion is buttressed by the

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[15] *See IRS v. Levy (In re Landbank Equity Corp.)*, 973 F.2d 265, 270 (4th Cir. 1992) (determination of tax claim under 11 U.S.C. § 505(a)(1)); *see also Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 576-80 (6th Cir. 1998) (determination of contract claim, subject to 11 U.S.C. § 502(b)(6)). *Compare United States v. Consumer Health Servs. of Am., Inc.*, 108 F.3d 390, 393-95 (D.C. Cir. 1997), *with University Med. Ctr. v. Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065, 1083-85 (3d Cir. 1992).

structure of section 502(b). It provides that after "determin[ing] the amount of [a] claim," the bankruptcy court "*shall allow* such claim in such amount," except to the extent it falls within one of eight enumerated exceptions.[16] 11 U.S.C. § 502(b) (emphasis added). None of those exceptions applies here.

Not only was the "conflict" a false one, but the court resolved it by misreading provisions of both the Bankruptcy Code and ERISA. First, the court of appeals improperly invoked 11 U.S.C. § 1123(a)(4). Pet. App. 15a. This provision—one of the criteria for the contents of a reorganization plan—deals with *distributions* on allowed claims. In requiring the "same treatment" for each claim or interest of a particular class, it addresses how claims are to be treated under a plan of reorganization *after* they have been determined and allowed by the bankruptcy court. PBGC has no quarrel with receiving the same (i.e., pro rata) treatment as others in the same class, *see In re AOV Indus., Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986), once its termination liability claim has been appropriately determined.

Second, the court of appeals erred in asserting that 29 U.S.C. § 1144(d) requires Title IV of ERISA to be "subordinated." Pet. App. 15a. On its face, the provision refers only to "this subchapter [subchapter I]," or what is commonly called "Title I" of ERISA, 29 U.S.C. §§ 1001-1168, which governs protection of employee benefit rights. This provision has no application whatsoever to subchapter III or "Title IV" of ERISA, 29 U.S.C. §§ 1301-1461, which governs plan termination insurance.

Any holding that a statute as prominent as ERISA is subordinated to the Bankruptcy Code is both suspect and important, and warrants this Court's review. The court of

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[16] A ninth exception was added in 1994. 11 U.S.C. § 502(b)(9) (1994).

appeals' departure from substantive nonbankruptcy law clears a path to arbitrary reductions in the claims of other government agencies, based on perceived conflicts with the Bankruptcy Code. Federal agencies appear as creditors in approximately 12,000 to 15,000 bankruptcy reorganization proceedings a year. Similar issues involving whether bankruptcy courts must follow nonbankruptcy law to determine liability to an agency, or are free to devise their own approach, have recently appeared in a variety of guises.[17] The principle that underlies the decision below is that the policies of the Bankruptcy Code override, and require subordination of, other statutory schemes. This is a dangerous rule, particularly for governmental entities, which depend on uniform compliance with their regulatory programs. As this Court said nearly a century ago, if Congress intended a bankruptcy exception to the general law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts v. Hammer*, 194 U.S. 441, 444 (1904), *quoted with approval in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986).

B. The Entire Amount of Minimum Funding Contributions Accruing Postpetition Is Entitled to Administrative Priority.

The court of appeals' second holding—that the cost of complying with the minimum funding standard is not an administrative expense—also raises fundamental questions of the relationship between bankruptcy and nonbankruptcy

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[17] *Compare Consumer Health Servs.*, 108 F.3d at 393-95, *with University Med. Ctr.*, 973 F.2d at 1083-85. *See also United States v. Craddock (In re Craddock)*, 149 F.3d 1249, 1257-59 (10th Cir. 1998); *United States v. Century Offshore Mgmt. Corp. (In re Century Offshore Mgmt. Corp.)*, 111 F.3d 443 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998).

law. Even before ERISA was enacted, meeting pension obligations was recognized as a "cost of doing business" during reorganization. *In re Penn Cent. Transp. Co.*, 484 F.2d 1300, 1304 (3d Cir. 1973); *Tate v. New York, N.H. & H. R.R.*, 332 F.2d 449, 452 (2d Cir. 1964). This Court has held that costs ordinarily incident to a debtor's business in bankruptcy are entitled to administrative priority. *Reading Co. v. Brown*, 391 U.S. 471, 483-85 (1968). There, under the Bankruptcy Act, the Court granted administrative priority to a postpetition tort claim. According to the Court, fairness required the claimant, whose property was damaged by a fire through the negligence of the receiver, to recover ahead of general creditors. "[T]he present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law." *Id.* at 477-78.

In the three decades since *Reading*, the lower courts have applied this precedent in a variety of settings. For example, in granting administrative priority to a fine for committing a public nuisance in violation of a zoning law, the First Circuit explained:

> [T]his case [is] an even stronger one for priority than was *Reading*. The debtor in this case *deliberately* continued a violation of law month after month presumably because it was more lucrative for the business to operate outside the zoning ordinance than within it. If fairness dictates that a tort claim based on negligence should be paid ahead of pre-reorganization claims, then *a fortiori*, an intentional act which violates the law and damages others should be so treated.

Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.), 755 F.2d 200, 203 (1st Cir. 1985). This growing line of cases has applied *Reading* to a variety of costs of complying with regulatory schemes, even in the

absence of any tangible benefit to the estate.[18] Yet two courts of appeal—the Tenth and Sixth Circuits—have balked at according administrative priority to minimum funding contributions required by statute. ERISA and the I.R.C. both require a pension plan to be funded until it is terminated. 29 U.S.C. § 1082; 26 U.S.C. § 412; Rev. Rul. 79-237, 1979-2 C.B. 190. Because maintaining a pension plan during bankruptcy necessarily entails the legal duty to satisfy the minimum funding standard, unpaid contributions should be treated as costs ordinarily incident to the debtor's business. As the *Sunarhauserman* dissent observed, "the [bankruptcy] statutes . . . do not value certain regulations more than others." 126 F.3d at 822 (Kennedy, J., dissenting). Moreover, the policies underlying *Reading* support administrative priority here. It would be inefficient if a debtor did not bear the full cost of ordinary operations, thereby distorting the choice between reorganization and liquidation. *See Reading*, 391 U.S. at 482-83.

The court's conclusion that the duty to pay minimum funding contributions was contractual, rather than statutory, is singularly confused. An employer's duty to pay minimum funding contributions, so long as it maintains a pension plan, is no less statutory than its duty to pay the minimum wage. That the employer and union may have "bargained for pension benefits," Pet. App. 11a, does not

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[18] *E.g., Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 20-21 (1st Cir. 1997) (fine for violation of state financial responsibility laws); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1453-58 (11th Cir. 1992) (civil penalties for violations of state surface mining act); *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (environmental cleanup costs); *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123-24 (6th Cir. 1987) (environmental cleanup costs); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983) (compliance with back pay order under National Labor Relations Act).

supersede the statutory funding requirements, nor does it change the basis for the claim. The employer's statutory obligation to pay contributions to the plan is entirely separate from the plan's obligation to pay benefits to participants. *See Hughes Aircraft*, 119 S. Ct. at 762 (noting that "Hughes satisfied its continuing obligation under the provisions of the Plan *and ERISA* to assure that the Plan was adequately funded") (emphasis added). Indeed, the employer's statutory duty to contribute would override any conflicting contractual obligation. *See Connolly v. PBGC*, 475 U.S. 211, 223-24 (1986). The court's assertion that, "[t]he fact a statute provides the means by which they may terminate their agreement does not trump the contractual nature of the benefits plan," Pet. App. 11a, further confuses the question. The issue is *funding*, not termination. And it is the statutory mandate for the funding obligation that makes this case similar to those where courts have awarded administrative priority.

In characterizing the minimum funding obligation as contractual, the court of appeals raised another question with implications for federal and state agencies. It is not uncommon for statutory obligations to be imposed as a result of contractual relationships, but to have independent force. For example, as a result of past employment relationships, an employer may have a statutory duty to contribute to employee benefit funds under the Coal Industry Retiree Health Benefit Act ("Coal Act"). Nevertheless, courts to date have awarded such claims administrative priority, rejecting arguments that the liability was contractual or prepetition.[19]

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[19] *UMWA 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1279 (10th Cir. 1998); *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 799 (4th Cir.), *cert. denied*, 119 S. Ct. 404 (1998); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 497 (2d Cir. 1995). Such cases are unaffected by *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998) (Coal Act unconstitutionally applied in exceptional facts and circumstances).

Because the court of appeals viewed the funding obligation as contractual, it also misapprehended the timing of the obligation. The claim for contributions accruing postpetition did not arise, as the court assumed, from the prepetition labor of Debtors' employees. Under ERISA, an employer has a *current* and recurring duty to eliminate, each plan year, any accumulated funding deficiency. 29 U.S.C. § 1082(a)(1). The funding obligation arises from and is coterminous with the continuation of the plan, and may be ended only by plan termination. There was no "right to payment," 11 U.S.C. § 101(5)(A), of postpetition contributions except insofar as CF&I continued to sponsor the plan postpetition. "Although the Bankruptcy Code defines 'claim' broadly, the relevant non-bankruptcy law must be examined to see whether a right to payment, even a contingent right, exists." *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan,* 162 F.3d 405, 409 (6th Cir. 1998). This claim did not even *exist* prior to the petition date. *See LTV Steel v. Shalala,* 53 F.3d at 497. Indeed, had CF&I terminated its plan before bankruptcy, this claim would never have arisen at all.

Similarly, the court's characterization of the minimum funding obligation as prepetition, because it is measured in part by historical or experience-based factors, may have repercussions for other agencies. Environmental cleanup obligations often arise from prepetition pollution; workers' compensation premiums from prepetition accidents; and land reclamation requirements, as well as health and welfare fund contributions, from prepetition mining.[20] In each of these situations, courts have ruled that the cost of com-

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[20] *See, e.g., United States v. LTV Corp.*, 944 F.2d at 1009-10 (environmental cleanup costs); *Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997) (workers' compensation premiums); *In re Bill's Coal Co.*, 124 B.R. 827, 830 (D. Kan. 1991) (land reclamation costs); *LTV Steel v. Shalala*, 53 F.3d at 496-97 (health and welfare fund contributions).

plying with a statutory obligation is an administrative expense even where historical or experience-based factors are used to establish the amount of a current liability. The court's decision, however, invites debtors to argue that because their current statutory obligations have some nexus to prepetition factors, they must be denied priority. The court of appeals' misunderstanding of ERISA's minimum funding obligation raises fundamental questions worthy of this Court's review. As the dissenting opinion in *Sunarhauserman* noted, "denying priority to debts which the PBGC incurred by helping the Debtors remain in business is analytically unsound and creates precedent harmful to deserving creditors in other cases." 126 F.3d at 823 (Kennedy, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 1999

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ——

In The Supreme Court of the United States

October Term, 1998

Pension Benefit Guaranty Corporation,
Petitioner,

v.

Reorganized CF&I Fabricators of Utah, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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[Filed Aug. 3, 1998]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-4121

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

CF&I FABRICATORS OF UTAH, INC.; COLORADO & UTAH LAND COMPANY; KANSAS METALS COMPANY; ALBUQUERQUE METALS COMPANY; PUEBLO METALS COMPANY; DENVER METALS COMPANY; PUEBLO RAILROAD SERVICE COMPANY; CF&I FABRICATORS OF COLORADO, INC.; CF&I STEEL CORPORATION; COLORADO & WYOMING RAILWAY COMPANY; UNSECURED CREDITORS COMMITTEE; UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC; WILLIAM J. WESTMARK, Trustee of the Colorado & Wyoming Railway Company,
Appellees.

No. 97-4122

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

CF&I FABRICATORS OF UTAH, INC.; COLORADO & UTAH LAND COMPANY; KANSAS METALS COMPANY; ALBUQUERQUE METALS COMPANY; PUEBLO METALS COMPANY; DENVER METALS COMPANY; PUEBLO RAILROAD SERVICE COMPANY; CF&I FABRICATORS OF COLORADO, INC.; COLORADO & WYOMING RAILWAY COMPANY,
Appellees.

Appeal From the United States District Court
for the District of Utah
(D.C. Nos. 93-CV-744-B and 96-CV-202-B)

Before PORFILIO, McKAY, and TACHA, Circuit Judges.

PORFILIO, Circuit Judge.

In this appeal we are asked to determine whether claims for a Chapter 11 debtor's minimum contributions to an employee pension plan are entitled to tax or administrative priority in bankruptcy. In addition, we must determine which valuation method should be used to calculate the present value of unfunded benefit liabilities owed by CF&I Steel Corporation and its subsidiaries (CF&I), Appellees-Debtors in this case.

This inquiry comes to us because of a conflict between provisions of the Employee Retirement Income Security Act (ERISA) and the Bankruptcy Code. Appellant Pension Benefit Guaranty Corporation (PBGC), a private governmental corporation modeled after the Federal Deposit Insurance Corporation and charged statutorily with protecting and preserving private pension plans, seeks to

recover sums by way of priority claims from CF&I's Chapter 11 bankruptcy estate. PBGC bases its rights to bankruptcy priority chiefly upon powers and rights vested in it by ERISA, but not the Bankruptcy Code. The major controversy between the parties is whether the ERISA provisions carry over into bankruptcy or whether PBGC comes to Chapter 11 like any other unsecured creditor. After consideration of all the arguments, we conclude PBGC is not entitled to special rights in bankruptcy and its ERISA powers and rights do not give it priority over the other unsecured creditors of CF&I's estate.

A. Background

Prior to the economic events which eventually led CF&I into Chapter 11, it sponsored a defined benefit pension plan subject to the termination provisions of Title IV of ERISA. An employer's choice to initiate such a pension plan is totally voluntary; however, once that plan is established, the employer must meet the minimum funding standards prescribed in the Internal Revenue Code (IRC) and ERISA. Moreover, the employer must meet these standards until its plan is terminated either voluntarily by the employer or involuntarily by PBGC.

CF&I met its funding obligations until a decline in economic conditions of the American steel industry left it unable to make minimum funding contributions of approximately $14 million. This state of affairs led CF&I into filing a Petition for Relief under Chapter 11 of the Bankruptcy Code.

CF&I continued to operate its business as debtor-in-possession and made substantial contributions to non-PBGC insured employee benefit plans providing health and life insurance. Although CF&I made no contributions to its pension plan, it did not seek voluntary termination. Finally, when the assets of the estate dwindled, PBGC terminated the plan and became its statutory trustee. *See* 29 U.S.C. § 1342 ("The [PBGC] may institute proceedings under this section to terminate a plan whenever it

determines that . . . the plan has not met the minimum funding standard required under section 412 of Title 26. . . .").

Subsequently, CF&I achieved confirmation of a negotiated plan of reorganization which, among other provisions, set aside a sum of money as an "Appeal Fund" preserving PBGC's right to pursue its claims against that fund. PBGC has agreed to limit its recovery, if any, to the amount set aside.

PBGC filed two claims against the estate. The first was in the amount of $64,874,511 for CF&I's unpaid contributions to the benefit plan. The second was in the amount of $263,200,000 for unfunded benefit liabilities accruing because of the lack of assets in the benefit plan. For reasons we shall discuss later, PBGC asserted its claims were entitled to priority payment as a tax claim and were a cost of the estate entitled to priority as an administrative claim.

The bankruptcy court held PBGC was entitled to an administrative priority claim for the post-petition component of its unpaid contributions claim attributable to post-petition services of employees. However, the court denied tax priority or administrative priority for amounts other than these post-petition costs. The district court affirmed these decisions.

However, the district court reversed the bankruptcy court's holding that PBGC's unfunded benefits claim, which must be reduced to present value to be allowed, should be valued in accordance with PBGC's regulatory system and not by Bankruptcy Code standards. Finding an inexorable conflict between ERISA and the Bankruptcy Code, the court held the Bankruptcy Code must dominate. Hence, it concluded, "the actuarial present value of guaranteed benefits in a reorganization context [must be] determined according to bankruptcy law." On remand, the bankruptcy court applied the "prudent-investor" valuation method and allowed PBGC a general

unsecured claim in the amount of $124,441,000 as the present value of CF&I's unfunded benefit plan future liabilities.

On appeal to this court, PBGC contends the district court erred by denying tax priority to its first claim based on unpaid past plan contributions in excess of $1 million and administrative priority to its entire claim for unpaid plan contributions. It also contends the court erred by refusing to use PBGC's regulatory methodology to determine the present value of the unfunded benefits claim.

B. Tax Priority

PBGC argues because of specific provisions in ERISA, we should conclude Congress expressly directed that CF&I's unpaid minimum funding contributions in excess of $1 million must be treated as taxes and accorded tax priority under the Bankruptcy Code. The district court's denial of tax priority is a conclusion of law which we review de novo. *Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 174 (10th Cir. 1996).

PBGC's argument is grounded upon 26 U.S.C. § 412 (n)(1)(B) which provides, when unpaid minimum funding contributions exceed $1 million, "then there shall be a lien in favor of the plan . . . upon all property, whether real or personal, belonging to such person . . . ." Moreover, 26 U.S.C. § 412(n)(4) (1990) adds:

> (B) Period of lien.—The lien imposed by paragraph (1) shall arise on the 60th day following the due date for the required installment . . . .
>
> (C) Certain rules to apply.—Any amount with respect to which a lien is imposed under paragraph (1) shall be treated as taxes due and owing the United States and rules similar to the rules of subsections (c), (d), and (e) of section 4068 of the Employee Retirement Income Security Act of 1974 shall apply

with respect to a lien imposed by subsection (a) and the amount with respect to such lien.

The first question we must resolve, however, is to what extent these ERISA provisions are applicable in bankruptcy. To resolve the question, both parties point to *United States v. Reorganized CF&I Fabricators, Inc. (In re CF&I Fabricators (I))*, 518 U.S. 213 (1996), where the Court examined whether an "exaction ought to be treated as a tax [in bankruptcy] . . . without some . . . dispositive direction [from Congress]." *Id.* at 219. At issue was an exaction under the IRC of 10% on the amount of the accumulated funding deficiency of CF&I's Plan for which the IRS asserted a tax priority claim.[1] Although the IRC defines the exaction as a "tax," the Court stated, "characterizations in the Internal Revenue Code are not dispositive in the bankruptcy context . . . ." *Id.* at 224.

To determine whether Congress intended the exactions be given tax treatment in the bankruptcy context, the Court first looked for some "explicit connector between" the IRC provision and the Bankruptcy Code. Finding no link, the Court "looked behind the label placed on the exaction" and conducted a "functional examination" of the provision in question to determine whether it was " 'a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.' " *Id.* (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492 (1906)).

CF&I argues there is no "explicit connector" between § 412(n) and the Bankruptcy Code; therefore, we must apply the "functional examination" to determine if the

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[1] *See* 26 U.S.C. § 4971(a), which states:

> Initial tax.—For each taxable year of an employer who maintains a plan to which section 412 applies, there is hereby imposed a tax of 10 percent (5 percent in the case of a multiemployer plan) on the amount of the accumulated funding deficiency under the plan, determined as of the end of the plan year ending with or within such taxable year.

exaction in this case qualifies as a tax. In pursuit of that examination, it reasons because PBGC is a privately funded entity, the payment of the minimum benefits contribution cannot possibly be "for the purpose of supporting the Government." Thus, CF&I concludes, those required payments do not meet the definition of a tax.

In response, the PBGC insists there is a connection between § 412(n) and the Bankruptcy Code in this case because, unlike *In re CF&I Fabricators (I)*, the ERISA provision specifically "connects" to the Bankruptcy Code. PBGC points to that portion of § 412(n)(4)(C) which states, "[a]ny amount with respect to which a lien is imposed . . . shall be treated as taxes . . . and rules similar to the rules of subsections (c), (d), and (e) of section 4068 of [ERISA] shall apply . . . ." Moreover, § 4068 (c) adds, "[i]n a case under Title 11 or in insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of Title 11 . . . ." 29 U.S.C. § 1368(c).

Reading these provisions together, we can see at least a tangential connection between § 412(n) and the Bankruptcy Code. The deciding question, however, is whether they constitute an "explicit connection" within the meaning of *In re CF&I Fabricators (I)*. We do not believe they do.

As we read the Court's analysis, the key to whether a statutory provision is "explicit" in this context is whether the *Bankruptcy Code* adopts and makes specific reference to the provisions of the other law. *In re CF&I Fabricators (I)*, 518 U.S. at 220. In this case, even though ERISA tangentially refers to "a case under Title 11 or in insolvency proceedings," the defect in the statutory construct found in *In re CF&I Fabricators (I)* is still present. That is, Congress made no specific reference in 11 U.S.C. § 507(7) to 29 U.S.C. § 412(n)(4). As a consequence, the relationship established between ERISA and the Bank-

ruptcy Code is not explicit by definition. Thus, we conclude there is no *expressed* congressional intent that the "tax treatment" described in § 412 was meant to apply in the bankruptcy context.

This conclusion takes us into the functional analysis initiated in *In re CF&I Fabricators (I)*. The quest begins with *City of New York v. Feiring*, 313 U.S. 283 (1941), in which the Court instructed tax priority in bankruptcy "extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, *for the purpose of defraying the expenses of government* or of undertakings authorized by it." *Id.* at 285 (emphasis added). As we have noted recently in *United Mine Workers 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, No. 97-1276, 1998 WL 380966 (10th Cir. Colo. July 9, 1998), —— F.3d —— (10th Cir. 1998), this analysis was sharpened in *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir. 1995), which followed the lead of the Ninth Circuit [2] in setting forth four factors for determining whether contributions required of a debtor are entitled to tax priority in bankruptcy.[3] If the contributions are:

1. An involuntary pecuniary burden, regardless of name, laid upon the individuals or property;
2. Imposed by, or under authority of the legislature;
3. For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;
4. Under the police or taxing power of the state;

the contributions have the functionality of a tax and claims for those contributions are entitled to tax priority. This analysis disposes quickly of PBGC's basic contention.

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2 *See County Sanitation Dist. No. 2 v. Lorber Indus., Inc. (In re Lorber Indus., Inc.)*, 675 F.2d 1062, 1066 (9th Cir. 1982).

3 Although the cases do not involve ERISA contributions, we choose to follow the paradigm because of its rationality.

We believe the ERISA contribution fails the third element of the *Chateaugay* test. PBGC admits the contributions are directed to and for the protection of individual benefit plans. Thus, the object of the contributions is not to defray the expenses of the government or any governmental undertaking, but rather, is to finance a private obligation. Although mandated by statute, there is simply no credible argument that the required payments fund either a function of the United States or any of its undertakings. It thus follows PBGC's claim for unpaid minimum contributions is not to be accorded tax priority.[4]

C. Administrative Priority

PBGC next argues if its minimum contributions claim does not qualify as a priority tax claim, it is still entitled to a priority administrative claim because the contributions were "actual, necessary costs and expenses of preserving the estate . . . for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). PBGC argues we should be governed by the reasoning of *Reading Co. v. Brown*, 391 U.S. 471 (1968).

In *Reading*, a case under the former Bankruptcy Act, the Court granted administrative priority to a claim for post-petition "damages resulting from the negligence of the receiver." Later cases have expanded this analysis. *See, e.g., Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16 (1st Cir. 1997) (fine for

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[4] The bankruptcy court and district court both determined PBGC's minimum contrbutions claim was not entitled to this tax priority because the lien of § 412(n) did not arise prior to CF&I's bankruptcy petition. Section 412(n)(4)(B) states the lien imposed "shall arise on the 60th day following the due date . . . ." Here, the due date for CF&I's minimum contribution was less than 60 days before the Debtors filed bankruptcy; hence, the automatic stay of bankruptcy would have prevented the lien from arising. As Debtors insist, "the automatic stay prevented any liens from affixing, being created, perfected, or enforced." Our holding here makes consideration of this point moot.

violation of financial responsibility provision of environmental laws); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449 (11th Cir. 1992) (civil penalties for violations of the Alabama Surface Mining Act). At a minimum, these cases demonstrate a judicial willingness to extend administrative claim status to tortious damages incurred post-petition and statutory penalties in the environmental law arena incurred post-petition. For PBGC's argument to succeed, therefore, the minimum contributions would have to be statutory and post-petition.

In support of its position that the minimum contributions are a statutory requirement, PBGC cites the provision requiring satisfaction of the minimum funding standard. 29 U.S.C. § 1082(a)(1). PBGC then notes CF&I was obliged to meet these statutory obligations until the Plan was terminated and maintains that obligation continued even during bankruptcy, relying upon *In re New Center Hosp.*, 200 B.R. 592, 593 (E.D. Mich. 1996) ("Courts have held that statutory obligations that bind the debtor will subsequently bind the bankruptcy trustee."). PBGC argues this provision makes clear the minimum contributions claim in this case arises out of a statutorily required post-petition obligation that could not be abandoned.

CF&I responds this contention overlooks the fact the CF&I pension plan was written, collectively bargained, relied upon, and was part of the consideration for the work performed by its beneficiaries in the decades before its bankruptcy. Moreover, CF&I reminds, the Bankruptcy Code itself recognizes contributions to pension plans are compensation for services and, thus, by definition are contractual in nature. *See, e.g.*, 11 U.S.C. § 507(a)(4) (granting a fourth priority to "allowed unsecured claims for *contributions* to an employee benefit plan . . . (a) arising from *services rendered* within 180 days before the date of the filing of the petition . . . ." (emphasis added)).

Curiously, PBGC's own Reply Brief boosts CF&I's argument in stating:

> In this case CF&I and the USWA bargained for pension benefits that the company later found it could not afford. These parties together could have agreed, either before or after bankruptcy, to terminate the Pension Plan ("Plan") voluntarily before contributions went unpaid and the funding gap widened.

It is evident the plan and the obligations arising from it were a matter of contractual bargaining and agreement between an employer and its employees. The fact a statute provides the means by which they may terminate their agreement does not trump the contractual nature of the benefits plan.

Even if we were to assume the contributions were statutory in nature, the *Reading* line of cases only allows administrative priority for post-petition expenses. *See In re Sunarhauserman, Inc.*, 126 F.3d 811, 817 (6th Cir. 1997) ("To be sure, the *Reading* rationale allows administrative expense priority in the absence of a post-petition benefit to the estate. However, even in *Reading* and cases following it, the debt at issue arose post-petition."). Hence, the issue devolves to whether the minimum contributions are pre- or post-petition debts.

CF&I argues the claims are "derived from pension credits under a pension plan, all of which were earned by pre-petition consideration consisting of the labor of the pension plan's participants who did the work that earned these pensions." This position rests on the principle that liabilities are not incurred post-petition simply because they become due post-petition. *See, e.g., Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986); *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 115 B.R. 760, 775 (Bankr. S.D.N.Y. 1990) (vacated) ("The PBGC's right to payment upon termination was, on the petition date, a classic pre-petition contingent claim. The post-petition termination of the

pension plans did not transform the PBGC's contingent pre-petition claims into post-petition claims."); *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R. 690, 697 (S.D.N.Y. 1991) ("PBGC's claims are pre-petition contingent claims because labor giving rise to the pension obligations was performed pre-petition."); *In re Sunarhauserman, Inc.*, 126 F.3d at 819.

In contrast, PBGC points to the Coal Industry Retiree Health Benefit Act of 1992, 22 U.S.C. §§ 9701-9722, (Coal Act), and cases in which courts under its provisions wrestled with bankruptcy priorities, most notable of which is *LTV Co. v. Shalala (In re Chateaugay Corp.)*, 154 B.R. 416 (S.D.N.Y. 1993), *aff'd*, 53 F.3d 478 (2d Cir. 1995).

> [T]here is no doubt that the charges incurred by LTV Steel not only are a result of its association with previous collective bargaining agreements, but also are a direct consequence of its continued corporate existence; the Coal Act only imposes obligations on signatories which are still "in business." Thus, the charges stem from LTV Steel's continued operation in Chapter 11, and as such are costs of doing business best classified as "administrative expenses" within the Bankruptcy Code scheme.

Id. at 422 (footnote omitted).

We do not find the Coal Act cases helpful here. The nature of the Coal Act claims was fundamentally different from the claim presented in this case because the Coal Act claims are entitled to priority as a tax. *In re Sunnyside Coal Co.*, No. 97-1276, 1998 WL 380966 at *4. Inasmuch as the contributions in this case are not taxes, we can draw no parallels from the Coal Act cases that would apply here.[5]

---

[5] However, to the extent PBGC's claims are based on the labor of the workers during the post-petition period until termination, they have a post-petition administrative claim. In fact, the bankruptcy court has already allowed that claim.

Pointedly, asserting a separate interest from that of the Debtors, Appellee United Steel Workers of America (USWA)[6] suggests when Congress wanted to give administrative priority to claims, it did so by amending the Bankruptcy Code. In particular, USWA cites 11 U.S.C. § 1114, in which Congress provided that payment of retiree medical benefits due during bankruptcy "has the status of an allowed administrative expense." In contrast, Congress has not amended the Bankruptcy Code to provide administrative status for the PBGC's minimum funding contribution claim. We hold that claim is not entitled to administrative priority in this case.

D. Valuation of the Unfunded Benefits Claim

We now turn to the problem of valuing the claim for liabilities that accrued for plan benefits when PBGC terminated the plan. Inasmuch as those liabilities are for beneficiaries' payments that extend into the future, the amount of the liability must be reduced to present value so the debt can be dealt with under the reorganization plan. While the parties agree to the necessity for such a valuation, they disagree over the methodology to be employed. The dispute is significant because the proffered methods produce marked differences of $222,866,000 if PBGC's approach is utilized or $124,441,000 if CF&I prevails. The district court chose the latter, and PBGC claims the choice was erroneous.

To insure the relative equality of payment between claims that mature in the future and claims that can be paid on the date of bankruptcy, the Bankruptcy Code mandates that all claims for future payment must be reduced to present value. 11 U.S.C. § 502(b) ("[T]he court . . . shall determine the amount of such claim in lawful currency of the United States as of the date of the

[6] A major portion of the Appeals Fund will accrue to interests represented by USWA if the judgment of the district court is affirmed.

filing of the petition . . . ."). Accepting the need to discount the amount of the claim, the parties disagree only over the approach to valuation because of two ERISA provisions.

The first, 29 U.S.C. § 1362(b)(1)(A), provides:

> [L]iability to [PBGC] shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan . . . .

The second, 29 U.S.C. § 1301(a)(18), defines the "amount of unfunded benefit liabilities" as:

> the excess (if any) of—
>
> > (A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by [PBGC] for purposes of section 1344 of this title), over
> >
> > (B) the current value (as of such date) of the assets of the plan.

PBGC maintains this combination of statutes represents an express delegation of rule-making power to PBGC to determine the present value of its claims for terminated plans. PBGC argues, "Congress mandated that the assumptions used to determine the present value of benefit liabilities under terminated pension plans be the same assumptions used for purposes of valuing a plan's benefits under 29 U.S.C. § 1344." [7]

PBGC relies upon *Batterton v. Francis*, 432 U.S. 416 (1977), and *Chevron v. NRDC*, 467 U.S. 837 (1984), to remind us when Congress delegates rule-making power,

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[7] Because the liabilities of a terminating benefit plan are usually satisfied by the plan's purchase of annuities from private insurance companies, PBGC's methodology "produces a value of benefit liabilities in line with prices of insurance company annuity contracts issued to cover such benefits." The PBGC adjusts the rates quarterly using data from insurance company annuity price quotes.

the rule enacted has the force of law. In addition, it maintains the district court should have applied ERISA as an "external law" to determine the validity and amount of the claim in bankruptcy. *See Landsing Diversified Properties—II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 595-97 (10th Cir. 1990).

Although valid in other contexts, we do not believe these principles are applicable here. First, as noted by CF&I, 29 U.S.C. § 1301(a)(18) defines the amount of unfunded benefit liabilities "for purposes of this title [ERISA]" only. Therefore, its terms cannot extend to bankruptcy.

Second, 29 U.S.C. § 1301(a)(18) conflicts with provisions of the Bankruptcy Code, and, as the district court held, this conflict must be controlled by the Bankruptcy Code. Indeed, the very action in which the claim arises is, after all, bankruptcy. Congress has provided very precise contours of how claims that are administered in Chapter 11 are to be decided, and has pronounced as a cardinal rule that all claims within the same class must be treated alike. 11 U.S.C. § 1123(a)(4). That principle would be violated here if PBGC's interpretation of § 1301(a)(18) were adopted because PBGC's discount rate would apply only to it and not any other general unsecured creditor. Congress has made clear when ERISA conflicts with another provision of federal law, ERISA must be subordinated. 29 U.S.C. § 1144(d).

Nothing in the ERISA sections relied upon by PBGC implies a carry-over into the realm of bankruptcy to allow PBGC to set its own valuation methodology. Even though that methodology was adopted in the exercise of PBGC's administrative authority, we have no doubt of its inapplicability in the world of bankruptcy. The district court did not err in requiring the bankruptcy court to employ the prudent-investor discount to reach the present value of PBGC's unfunded benefits liability claim.

The judgment of the district court is AFFIRMED.

[Filed May 27, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 93-C-744B

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORP.,
Appellant & Cross-Appellee

vs.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Appellees & Cross-Appellants

No. 2:96 CV 202B

PENSION BENEFIT GUARANTY CORP.,
Appellant

vs.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Appellees.

FINAL JUDGMENT

The judgment of the Bankruptcy Court entered on May 21, 1993 is affirmed to the extent provided in this Court's decision of November 18, 1994 in No. 93-C-744B, and

the judgment of the Bankruptcy Court entered on January 29, 1996, is affirmed as provided in this Court's April 1, 1997 memorandum in No. 2:96 CV 202B.

DATED this 27th day of May, 1997.

/s/ Dee V. Benson
DEE V. BENSON
United States District Judge

[Filed April 1, 1997]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

District Court Case No. 2:96 CV 202 B

PENSION BENEFIT GUARANTY CORPORATION
Appellant,

vs.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Appellees.

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Appellant Pension Benefit Guaranty Corporation ("PBGC") appeals the bankruptcy court's decision that the discount rate to be applied in calculating the present value of unfunded future pension benefit liabilities is the rate of return a prudent investor would receive for investing the funds. The sole issue on appeal is whether the bankruptcy court erred in applying the prudent investor rate as the appropriate discount rate.

BACKGROUND

On March 19, 1992, PBGC, pursuant to its ERISA statutory mandate, involuntarily terminated the pension plan of Appellee CF&I Steel Corporation ("CFI"). In terminating CFI's pension plan, PBGC filed specific claims for the plan's unfunded future benefit liabilities ("unfunded claims"). PBGC valued those claims at $222,866,000. The Debtors and Unsecured Creditors Committee objected to PBGC's valuation of the unfunded claims on the ground that PBGC improperly inflated its claims by using an artificially low discount rate.

After conducting a three-day evidentiary hearing, the bankruptcy court found that the 6.5% discount rate formulated and used by PBGC in assessing the present value of the unfunded claims was appropriate and should only be modified upon a finding that it was manifestly unfair or unreasonable. The bankruptcy court concluded the rate proffered by PBGC was entitled to deference despite the fact that the PBGC discount rate would negatively impact the distribution of funds to other similarly situated creditors . Consequently, the bankruptcy court allowed PBGC's claims in the amount of $220,953,000.

Both the reorganized debtors and PBGC appealed various portions of the bankruptcy court's final order to this court. After reviewing the bankruptcy court's final order, along with the parties' briefs, this court ruled that the bankruptcy court erred in subordinating the Bankruptcy Code to ERISA which led the bankruptcy court to adopt the 6.5% discount rate formulated and used by PBGC in valuing its unfunded claims. Accordingly, this court remanded to the bankruptcy court the issue of the proper discount rate to be applied in valuing PBGC's unfunded claims. This court specifically instructed the bankruptcy court to undertake an "independent evaluation" in ascertaining the appropriate discount rate while conforming to the Bankruptcy Code's requirement that similarly situated creditors be treated equally. *In re CF & I Fabricators of Utah, Inc.*, 179 B.R. 704, 710-711 (D. Utah 1994).

On remand, the parties chose not to produce any additional evidence. The bankruptcy court found that the 6.5% discount rate advocated by PBGC did not conform to this court's mandate that the bankruptcy court apply an independent discount rate consistent with the Bankruptcy Code's mandate of equality of treatment between similarly situated creditors. The bankruptcy court, therefore, ruled that the only discount rate in evidence that satisfied the standard established by this court was the

12.3% prudent investor rate. The bankruptcy court, therefore, revalued PBGC's unfunded claims at $122,528,-000 using the prudent investor rate of 12.3%. PBGC now appeals the bankruptcy court's use and application of the 12.3%. PBGC now appeals the bankruptcy court's use and application of the 12.3% prudent investor rate.

STANDARD OF REVIEW

On appeals from decisions of the Bankruptcy Court, the District Court sits as an appellate court. 28 U.S.C. § 158 (a). This court conducts a *de novo* review of the Bankruptcy Court's conclusions of law. *SLC Ltd. v. Bradford Group West,* 999 F.2d 464, 466 (10th Cir. 1993). Questions of fact are reviewed for correctness and will not be disturbed unless there is no reasonable basis to support them. *Id.*

Whether the discount rate formulated and used by the Bankruptcy Court in determining the present value of the unfunded claims is compatible with the Bankruptcy Code's direction that all similarly situated creditors be treated equally is a question of law. The only issue on appeal is whether the prudent investor rate used by the bankruptcy court in determining the present value of the unfunded claims comports with the principle of equality required by the Bankruptcy Code. We, therefore, review *de novo* the bankruptcy court's determination that the prudent investor approach rate is the only rate in evidence that satisfies the Bankruptcy Code's requirement of equality.

DISCUSSION

I. *PBGC's Motion for Reconsideration*

PBGC first asks this court to reconsider its previous decision that "ERISA and the Bankruptcy Code conflict," that "ERISA must be subordinated to the Bankruptcy Code," and that "the present value calculations relating to pension termination liability must be determined according to bankruptcy law." *Id.* at 710.

Rule 59 of the Federal Rules of Civil Procedure provides, "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Similarly, the Bankruptcy Code provides, "Unless the district court . . . by local rule or by court order otherwise provides, a motion of rehearing may be filed within ten days after entry of the judgment of the district court." Bankr. R. 8015. This court entered its decision on November 18, 1994. PBGC has never, until now, moved this court to reconsider its November 18, 1994 decision. PBGC's request that this court reconsider its previous ruling is untimely. Accordingly, this court declines to reconsider its November 18, 1994 decision.

II. *Propriety of the Prudent Investor Rate*

The bankruptcy court originally applied the 6.5% discount rate formulated and advanced by PBGC without analyzing any of the rates proffered by the debtors. On appeal, this court directed the bankruptcy court to apply an independent rate that "advance[d] the principle of equality of treatment between similarly situated creditors." *In re CF & I,* 179 B.R. at 710. On remand, the bankruptcy court found that the 6.5% rate proffered by PBGC was creditor specific to PBGC and, therefore, was inconsistent with fundamental principles of federal bankruptcy law. The bankruptcy court also found that the prudent investor rate was the only discount rate in evidence that satisfied the Bankruptcy Code's requirement that all similarly-situated creditors be treated equally. Therefore, the bankruptcy court adopted and applied the 12.3% prudent investor rate in determining the present value of the unfunded claims.

PBGC argues that the bankruptcy court erred in rejecting its 6.5% discount rate and in applying the prudent investor rate. This court disagrees with PBGC's contention. The bankruptcy court was correct in concluding that the 6.5% rate advocated by PBGC is creditor specific.

The 6.5% discount rate advanced by PBGC is based upon PBGC's efforts to replicate "the market price from an insurance company for the close-out annuities from a terminated pension plan." *In re CF & I*, No. 90B-6721 at 4 (Bankr. D. Utah November 27, 1995). The bankruptcy court specifically found that "the price of a close-out annuity does not reflect the future earning power of money, but instead serves to promote the PBGC's own institutional goal of making plan termination less attractive than the purchase of close-out annuities." *In re CF & I*, No. 90B-6721 at 9 (Bankr. D. Utah November 27, 1995). That goal is inconsistent with ascertaining the true present value of the unfunded claims.

If the court were to apply PBGC's proposed 6.5% discount rate, PBGC could obtain a windfall at the expense of other similarly situated creditors. The unfunded claims could be discounted at the low 6.5% rate and then reinvested by PBGC in the market at the higher 12.3% prudent-investor rate. Such a result would unfairly benefit PBGC by inflating their claims while negatively impacting the distribution of funds to other similarly situated creditors. If PBGC were allowed to value their claims at the 6.5% discount rate, creditors behind PBGC would only be allowed to collect after PBGC's $212,286,-000 claim was satisfied. If the claims were valued at the 12.3% rate those creditors would only have to wait until the debtors satisfied their $124,441,000 claim to PBGC.

The prudent investor approach, on the other hand, is based upon the investor's objective of earning "the highest return on the invested capital consistent with preservation of the capital and minimizing of risk." *In re Chateaugay Corporation*, 126 B.R. 165, 176 (S.D.N.Y. 1991). The objective of the prudent investor approach is to determine the amount of money a prudent investor needs today to fund future payments to participants in the terminated plans. *Id.* The prudent investor approach is "used by financial analysts every day to determine the

present value of long term obligations" and is "realistically likely to result in the determination of the full economic value of the claim." *Id.* at 175-76. Consequently, the *Chaeaugay* court held that the reasonable prudent investor approach was the most appropriate for valuing PBGC's claims in that case.

We agree with the bankruptcy court that the 12.3% prudent investor rate is the only rate in evidence compatible with the Bankruptcy Code. It is based on commony accepted techniques and is readily and objectively verifiable. It is regularly used by financial analysts in determining the present value of long-term obligations. The 12.3% discount rate is more than fair considering the 16.6% average rate of return on CFI's pension plan over the past seven years. Tr. of Craft's Test. at 180. Finally, it satisfies this court's prior holding that present value calculations must be determined according to bankruptcy law, including "the principle of equality of treatment between similarly situated creditors." *In re CF & I,* 179 B.R. at 710.

Appellant's contention that the prudent investor approach will not enable PBGC to account for immediate cash draws against the fund is without merit. The bankruptcy court specifically found that "cash needs" could be satisfied by a number of sources including cash on hand, cash earnings on the investment portfolio itself or liquidation of stocks and bonds held by the portfolio." *In re CF & I,* No. 90B-6721 at 12 (Bankr. D. Utah 1995).

The bankruptcy court was correct in determining that the 6.5% discount rate formulated and advanced as the proper rate by PBGC is creditor specific and fails to comply with this court's mandate that the discount rate applied in determining the present value of the unfunded claims treat similarly situated creditors equally. The bankruptcy court's finding that the 12.3% prudent investor rate was the ony discount rate in evidence that satisfied

this court's mandate of equality among creditors was correct. Accordingly, the bankruptcy court's determination that the 12.3% prudent investor rate was the appropriate rate to apply in determining the present value of the unfunded claims is AFFIRMED.

DATED this 1st day of April, 1997.

/s/ Dee Benson
DEE BENSON
United States District Judge

[Filed Jan. 26, 1996]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jointly Administered Under Case No. 9J0B-6721 [sic]
IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors

Chapter 11

(Case No. 90B-6721)
(CF&I Fabricators of Utah, Inc.)
(Case No. 90B-6722)
(Colorado & Utah Land Company)
(Case No. 90B-6723)
(Kansas Metals Company)
(Case No.90B-6724)
(Albuquerque Metals Company)
(Case No. 90B-6725)
(Pueblo Metals Company)
(Case No. 90B-6726)
(Denver Metals Company)
(Case No. 90B-6727)
(Pueblo Railroad Service Company)
(Case No. 90B-6728)
(CF&I Fabricators of Colorado, Inc.)
(Case No. 90B-6729)
(CF&I Steel Corporation)
(Case No. 90B-6730)
(Colorado & Wyoming Railway Company)

ORDER ON MOTION OF PENSION BENEFIT
GUARANTY CORPORATION,
DATED JANUARY 5, 1996,
FOR ENTRY OF JUDGMENT

The Motion of Pension Benefit Guaranty Corporation dated January 5, 1996, for Entry of Judgment was heard by this Court on January 26, 1996. Appearances of counsel were made upon the Court record. Based upon this Court's Memorandum Decision on Motions for Judgment filed By Pension Benefit Guaranty Corporation Dated 3/7/95, and Reorganized Debtors' Dated 4/11/95, related to Twenty Amended Proofs of Claim filed by Pension Benefit Guaranty Corporation, and to resolve all issues of compliance with Rule 9021, Federal Rules of Bankruptcy Procedure, it is hereby

ORDERED that Pension Benefit Guaranty Corporation's unfunded benefit claims are revalued, utilizing a 12.3% discount rate, at $124,441,000.00 (less recovery by Pension Benefit Guaranty Corporation on duplicative claims), resulting in general unsecured claims each in the sum of $122,528,000.00.

Dated this 26th day of January, 1996.

United States Bankruptcy Court

/s/ Judith Boulden
HONORABLE JUDITH BOULDEN
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Bankruptcy Number 90B-6721

Chapter 11

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtor(s).

Case Number 90B-06721
CF&I Fabricators of Utah, Inc.
Case Number 90B-06722
Colorado & Utah Land Co.
Case Number 90B-06723
Kansas Metals Company
Case Number 90B-06724
Albuquerque Metals Company
Case Number 90B-06725
Pueblo Metals Company
Case Number 90B-06726
Denver Metals Company
Case Number 90B-06727
Pueblo Railroad Service Co.
Case Number 90B-06728
CF&I Fabricators of Colorado, Inc.
Case Number 90B-02769
CF&I Steel Corporation
Case Number 90B-06730
The Colorado and Wyoming Railway Company

MEMORANDUM DECISION ON MOTIONS FOR JUDGMENT FILED BY PENSION BENEFIT GUARANTY CORPORATION DATED 3/7/95, AND REORGANIZED DEBTORS DATED 4/11/95, RELATED TO TWENTY AMENDED PROOFS OF CLAIM FILED BY PENSION BENEFIT GUARANTY CORPORATION

This court previously ruled on certain issues related to the claims objections, brought by these now reorganized Chapter 11 debtors (Debtors) and the Official Unsecured Creditors Committee, to twenty amended proofs of claim filed by the Pension Benefit Guaranty Corporation (the PBGC). At the time these chapter 11 petitions were filed, the Debtors were sponsors, and CF&I Steel Cororation (CF&I) was the administator, of two pension plans that provided pension and pension-related benefits for employees and retirees. The two pension plans were The Pension Plan of CF&I Steel Corporation and Certain Subsidiaries (the Master Plan) and The Non-Contributory Pension Plan of CF&I Steel Corporation as Amended and Restated Effective January 1, 1989. Under these pension plans, CF&I was obligated to provide annual plan funding contributions based on the actuarial valuation of the benefits earned by its employees. CF&I failed to make the minimum funding payment that became due on the Master Plan on September 15, 1990, and filed the within chapter 11 cases on November 7, 1990. On March 1, 1992, the PBGC instituted proceedings to terminate the Master Plan and became the successor trustee and thus liable for guaranteed benefits to plan participants.

The PBGC filed two proofs of claim against each of the Debtors. The claims fell into two general categories: (1) claims for due and unpaid minimum contributions allegedly due and owing the Master Plan (the Minimum Contribution Claims) of $64,874,511 each, and (2)

claims for unfunded benefit liabilities under the Master Plan (the Unfunded Benefit Claims) of $212,286,000 each (collectively the PBGC's Claims). The $212,286,000 figure allegedly represented the present value of liability on the date the Master Plan was terminated, less the value of plan assets on that same date, and less the value of the unpaid Minimum Contribution Claims.

In a memorandum decision of November 9, 1992, this Court allowed the PBGC's Claims against the Debtors on a joint and several basis, but ruled that certain portions of the PBGC's Claims were not entitled to the status asserted by the PBGC. The court reserved for an evidentiary hearing the allowed amount of the PBGC's Claims, whether there existed any equitable grounds for the court to modify the present value of a portion of the PBGC's Claims, and the extent to which the PBGC's Claims were duplicative. After the evidentiary hearing on the remaining factual issues, by order of December 31, 1992, this Court ruled (among other things) that the Unfunded Benefit Claims would be calculated and allowed utilizing a 6.5% interest rate as one of several factors set forth in 29 C.F.R. § 2619 (1991) (Regulation) that was in effect as of the date of the termination of the Master Plan. The Regulation was supposed to determine the value of plan benefits under terminating pension plans by figuring the current value of projected benefits as of a specific date that was equal to the amount of money needed on that date to pay benefits over future years. The Regulation required the plan administrator to determine the present value of all plan benefits using the applicable formulas contained in the Regulation, together with prevailing PBGC factors, including interest expected retirement age, and mortality rates in effect on the valuation date. On May 21, 1993, after denying a motion for reconsideration filed by the PBGC, this Court allowed the PBGC's recalculated Unfunded Benefit Claims as general unsecured claims in the amount of $220,953,000, and incorporated

the prior orders of November 9, 1992 and December 31, 1992 by reference.

The parties filed cross-appeals, with the PBGC challenging this Court's ruling on a number of issues unrelated to this opinion. The Reorganized Debtors and the United Steelworkers of America, AFL-CIO-CLC, (United Steelworkers) appealed portions of this Court's rulings related (among other things) to whether this Court improperly gave deference to the PBGC's method of discounting its Unfunded Benefit Claims to present value.

By Opinion dated November 17, 1994, the United States District Court for the District of Utah affirmed all aspects of this Court's prior decisions, except with respect to whether this Court gave undue deference to the PBGC's determination of the method and discount rate to be applied to the Unfunded Benefit Claims. The District Court found that where, as in this case, ERISA and another federal statute conflict, ERISA must be subordinated.[1] The District Court determined that because the Bankruptcy Court has an additional mandate to advance the principle of equality of treatment between similarly situated creditors, ERISA must be subordinated to the Bankruptcy Code, and the present value calculations relating to pension termination liability must be determined according to bankruptcy law.[2] The matter was remanded with

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[1] ERISA states that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1985).

[2] The District Court held this Court applied the wrong standard of review in giving deference to the PBGC's interpretation, and the "application of an improper standard of review *may* have prevented the bankruptcy court from fulfilling its statutory obligation to independently ascertain an appropriate discount rate. The bankruptcy court's legal conclusion that deference was due PBGC's interpretation is reversed and remanded to the bankruptcy court to make an independent evaluation." Opinion dated November 17, 1994 at 14 (emphasis added).

the instruction that this Court make an independent discount rate determination without any deference to the position of the PBGC.

The PBGC then filed a Motion for Judgment in this Court requesting judgment in favor of the PBGC by allowing its Unfunded Benefit Claims as general unsecured claims in the amount of $220,953,000. The PBGC asserted that this Court's prior findings that the PBGC's Regulation replicated the market price from an insurance company for the close-out of annuities from a terminated pension plan was the correct test to apply in determining the appropriate discount rate. The PBGC also argued that the Reorganized Debtors' prudent-investor approach, failed on its own terms because the hypothetical pension plan portfolio had no cash reserve, and there was no consideration of how that may affect yield. Based on the reiterative method for placing a value on the PBGC's separate claim for unpaid minimum funding contributions and additional evidence submitted on that discrete issue on January 11, 1993, the PBGC asserted this Court's final order entered on May 21, 1993, that allowed the unfunded benefit liabilities claim in the amount of $220,953,000 was correct.

The Reorganized Debtors, supported by United Steelworkers, filed a cross-motion seeking judgment in favor of the Reorganized Debtors by revaluing the Unfunded Benefit Claims as general unsecured claims in the amount of $124,441,000 less any duplicate recovery by the PBGC. The Reorganized Debtors and United Steelworkers argued that the PBGC's proposed discount rate assumption was intended to satisfy policy goals under ERISA and was inconsistent with the Bankruptcy Code, that use of the PBGC's proposed discount rate would generate profit for the PBGC at the expense of other unsecured creditors, and, the only market-based discount rate consistent with the Bankruptcy Code established by competent evidence at trial was a 12.3% discount rate calcu-

lated utilizing a prudent-investor method presented by the Reorganized Debtors.

The Court heard oral argument on both motions, whereupon the matter was taken under advisement. This Court has now reviewed the parties arguments and memoranda, the transcripts from and evidence received at the prior evidentiary hearing, and has made an independent review of applicable case law. In consideration of the District Court's Opinion dated November 17, 1994, this Court now rules as follows:

ISSUES

This Court must determine the appropriate discount rate to be used to value the PBGC's Unfunded Benefit Claims in today's dollars, giving no deference to the PBGC's methodology and treating similarly situated creditors equally. All parties appear to agree that an unsecured claim for future payments must be discounted to present value to avoid over-compensation to a creditor resulting from the interest earning power of money. However, the PBGC asserts that a creditor-specific methodology should be used to calculate present value, whereas the Reorganized Debtors and United Steelworkers assert the appropriate approach is one that is non creditor-specific.

The PBGC argues, without supporting case law, for the cost of settlement approach. This approach is based on generally accepted accounting principles [3] and looks to the real-world cost of retiring actual pension fund liabilities in the close-out annuity market. The PBGC argues that no better source of valuation evidence exists than the active competitive market where insurers offer to take on unconditional and guaranteed obligations.

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[3] The PBGC specifically relies on a proncement [sic] promulgated by the Financial Accounting Standards Board as set forth in the Statement of Financial Accounting Standards No. 87 (FAS 87).

The Reorganized Debtors and United Steelworkers ask the Court to adopt the reasoning of Judge Lifland from the Southern District of New York, in a reported but vacated and withdrawn decision. They argue that the Court should utilize a prudent investor approach that produces a discount rate based on the following three criteria: (1) the rate should yield the true economic value of the claim; (2) the rate should be established by market value; and (3) the rate should be consistent with the principle of equality of distribution to unsecured creditors, citing *LTV Corp. v. Pension Benefit Guar. Corp. (In re Chateaugay Corp.)* 126 B.R. 165, 174 (Bankr. S.D.N.Y. 1991), *vacated on consent of the parties*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993) (LTV II).[4]

The PBGC bears the ultimate burden of proof as to the validity and the amount of its claim. *In re Harrison*, 987 F.2d 677, 680 (10th Cir. 1993). It must prove its claims by a preponderance of the evidence. *In re Lewis*, 80 B.R. 39, 41 (Bankr. E.D.Pa. 1987). Accordingly and in light of the District Court's Opinion dated November 17, 1994, in order to prevail, the PBGC must present evidence of a discount rate that is both consistent with the Bankruptcy Code and one that will yield the present value of its Unfunded Benefit Claims in today's dollars. The District Court instructed that the rate must be consistent with the Bankruptcy Code and its principle of equality of distribution among similarly situated creditors and that the policy objectives of ERISA must be subordinated to the Bankruptcy Code.

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[4] Although not controlling, the Court finds instructive the opinion of Judge Lifland in *Chateaugay*, which is directly on point. The parties disagree, however, on the extent to which this Court should consider the criteria set forth in that opinion. The Reorganized Debtors and United Steelworkers urge its complete adoption by this Court while the PBGC asserts this Court should reject it whole heartedly in favor of the cost of settlement approach.

ANALYSIS

The Court is unaware of any controlling authority setting a standard for discounting claims arising from the termination of a debtor's pension fund to present value. Although in the context of bankruptcy, discounting a creditor's claim of future damages to present value is not unusual,[5] few cases deal with discounting an unsecured stream of future payments.[6] The concept is nonetheless essential to equitable distribution among creditors. *In re O.P.M. Leasing Services, Inc.*, 79 B.R. 161, 165-67 (S.D.N.Y. 1987) (court measured creditor/lessee's claim requesting reimbursement for percentage of lump sum termination payment based on deprivation of future benefits in accordance with accepted contract law principles and discounted to present worth); *In re Winston Mills, Inc.*, 6 B.R. 587, 599-60 [sic] (Bankr. S.D.N.Y. 1980) (a reduction to present value of a stream of future payments has been accepted without question and is axiomatic in the determination of future payments of rent reserved in a lease). In contexts other than bankruptcy, federal courts often discount a future stream of payments to present value to prevent the injured party from obtaining an overpayment as a result of the prepayment of a claim. For example, federal courts routinely take into account the

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[5] Historically, establishing damages for termination of real property leases at less than full payment of the lease over time has been found by the Supreme Court to be fundamental to the bankruptcy process designed to relieve reorganizing corporate debtors of continuing liability yet allow landlords to participate in distribution. *See Kuehner v. Irving Trust Co.*, 299 U.S. 445, 453-55 (1937) (limiting damages to three times the annual rent of rejected real property lease under Section 77B of the Bankruptcy Act held not to be a taking of property without due process).

[6] Most cases determine the discount rate that should be applied to enable a claimant to receive deferred cash payments totaling at least the allowed amount of a claim in the context of a plan of reorganization under 11 U.S.C. § 1129(b)(2) and § 1325(a)(5). *See e.g., In re Hardzog*, 901 F.2d 858, 859-60 (10th Cir. 1990).

earning power of money when determining the award of damages necessary to compensate for lost future income. *E.g., Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). Although these courts consider various factors in arriving at a discount rate, the primary consideration is what rate will yield a reasonably safe, long-term investment available to the average person.[7]

The PBGC has failed to present any case law employing a creditor-specific approach to determine the appropriate discount rate. Therefore, this Court must determine if the approach advocated by the PBGC in attempting to meet its burden of proof is violative of Bankruptcy Code policy considerations to give equal treatment to all similarly situated unsecured creditors, or inconsistent with case law in this circuit. Upon due consideration, this Court finds the creditor-specific approach advocated by the PBGC is inconsistent with Bankruptcy Code standards of equal creditor treatment.

The PBGC's proposed discount rate assumption is intended to satisfy policy goals under ERISA and is

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[7] *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (no single method for determining present value is mandated by federal law and the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest); *Hoskie v. U.S.*, 666 F.2d 1353, 1355 (10th Cir. 1981) (the court must calculate an amount of money that can be invested in a reasonably safe long-term investment available to the average person, which ultimately will yield a sum equal to plaintiff's lost income over the span of his working life expectancy); *Steckler v. U.S.*, 549 F.2d 1372, 1378 (10th Cir. 1977), *cert. denied*, 290 U.S. 657 (1933) (trier of fact should take into account estimated changes in the purchasing power of money, and at the same time discount the future income stream to its present value); *Southern Pac. Co. v. Klinge*, 65 F.2d 85, 87 (10th Cir. 1933) (the jury should determine from the evidence what interest could be fairly expected from safe investment which a person of ordinary prudence, but without particular financial experience or skill could make in that locality).

inconsistent with the underlying principles of the Bankruptcy Code.

This Court previously ruled that the PBGC had properly calculated the Unfunded Benefit Claims according to the Regulation, including the utilization of the PBGC's expected retirement age. Upon review, this Court sees no basis to modify that portion of the ruling finding that the PBGC accurately calculated its claim according to its Regulation. However, as this Court previously ruled, the Regulation is designed to produce a price that would be charged by the private sector in issuing an annuity to a particular group of lives. Replication of a private annuity contract, however, is only relevant to the valuation of liabilities under ERISA. The evidence indicates the Regulation serves to minimize any incentive of an employer to close-out a terminating pension plan by transferring liabilities to the PBGC, rather than by purchasing a private insurance company annuity. The PBGC's efforts to replicate the price of a close-out annuity does not reflect the future earning power of money, but instead serves to promote the PBGC's own institutional goal of making plan terminations less attractive than the purchase of close-out annuities.

This Court's prior ruling also incidated that the rate used to determine the present value of the PBGC's Claims should take into consideration, not a risk-free rate, but at least a rate that was consistent with the PBGC's obligations to ensure that payments will be made to pensioners. That ruling was in error because it considered a creditor-specific element to the detriment of other unsecured creditors. Since the District Court ruled that all similarly situated creditors should be treated the same, such factors as the recognition of the PBGC's obligation to guarantee performance on all defaulted pension plans, its obligation to provide conservative investment management, and the prior ruling that the PBGC's rate should be disallowed only if there is manifest unfairness or unreasonableness, is incorrect.

The PBGC's discount methodology does not yield a discount rate.

This Court's prior ruling found that the PBGC's discount methodology yielded a discount factor, not an interest rate. The discount factor had significance only in conjunction with the PBGC's other actuarial assumptions set forth in the Regulation. A review of the evidence indicates that the discount factor is not a rate with independent economic significance, but only a mathematical by-product of the PBGC's effort to replicate the price of private annuity contracts. It is created by the division of the mortality table values into the annuity purchase price that then equals the discount factor. Because the discount factor is "derived," it has no economic significance independent of the PBGC's survey of annuity prices and application of its mortality tables to the annuity pricing information. Since such an application serves only the unique characteristics of the claimant, it is not a reliable source to calculate the present value of the Unfunded Benefit Claims.

In its prior ruling, this Court also ruled that use of the PBGC's regulations to calculate its Unfunded Benefit Claims would have a significant adverse impact on the claims of other unsecured creditors. However, this Court ruled that the use of the Regulation would be disallowed only if the calculation of the PBGC's Claims were unjustifiably inflated to the detriment of the balance of the creditors. Since the District Court has determined that no deference should be given to the PBGC's determination of the appropriate discount rate, the rejection of that determination only if it unjustifiably inflates the PBGC's Claims, is incorrect.

The only market-based discount rate consistent with the Bankruptcy Code estabilshed by competent evidence at trial was the rate presented by the Reorganized Debtors.

The evidence indicated that the discount factor employed by the PBGC was not representative of future

investment yields or any rate of return. The Regulation does not consider expected interest earnings of a prudent-investment portfolio, or a reasonably safe long-term investment. The objective of the Reorganized Debtors' prudent-investor approach was to determine the amount of money a prudent investor needed today to fund the required future payments to participants.[8] The Court previously found that the Reorganized Debtors' prudent-investor approach was carefully developed analyzing generally accepted source materials used in financial markets. It was presented by a witness who was a qualified expert on the present value of claims in bankruptcy cases.

The prior ruling criticized the prudent-investor approach on several grounds. Included in that criticism was that the prudent-investor approach assumed a risk factor that was inconsistent with the PBGC's statutory role as a guarantor of pension funds, and that it failed to provide adequate compensation to the PBGC for the assumption of additional risk. This Court finds those criticisms to be incorrect in light of the District Court's ruling because they improperly focus on the unique characteristics of the PBGC as a special creditor, as opposed to merely one of a class of unsecured creditors. This Court also criticized the prudent-investor approach because it produced a discount rate that was generally higher than that projected by many large pension plans. Again, this comparison is invalid because it focuses on a methodology utilizing accounting principles unique to the calculation of pension expenses and obligations to determine pension costs.

The most significant criticism of the prudent-investor approach was that the investment portfolio mix failed to include cash resources required to pay obligations due in

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[8] In its prior ruling, this Court rejected the "debtor-specific" approach for discounting the PBGC's Claims to present value. Upon review, this Court finds no basis to modify that ruling.

the near future. This Court reasoned that either the hypothetical portfolio would have to be partially liquidated to meet current obligations, or that the PBGC would have to use its other assets to meet immediate cash obligations under CF&I's terminated plan. A careful review of the evidence indicates that cash needs could be satisfied by a number of sources including cash on hand, cash earnings on the investment portfolio itself, or liquidation of stocks and bonds held by the portfolio. In addition, the hypothetical portfolio should have a zero balance at the conclusion of payments to retirees.

The Court previously found the lack of cash resources placed the prudent-investor approach in doubt. Upon reconsideration, there is insufficient evidence to indicate that the hypothetical portfolio generating a 12.3% discount rate could not meet future obligations. Although it appears the necessity to meet cash obligations in the near future could significantly impact the future earnings of the hypothetical portfolio, the extent of the impact is not before the court. The Court will not speculate, in the absence of specific evidence, that the lack of cash resources invalidates the prudent-investor approach.

The prudent-investor approach, even if less than perfect, is the only discount rate before the Court that comes close to meeting the standard articulated by the District Court. To accept the PBGC's argument that the discount rate is inextricably bound to the actuarial assumptions used to calculate the aggregate future pension liabilities is to accept PBGC's original position that ERISA's policy objectives must be satisfied at the expense of the policy goals of the Bankruptcy Code. Since the Court now rejects that argument, the PBGC's assertion that the prudent-investor approach analyzed the wrong market is also rejected. Because the PBGC has failed to carry its burden of proof by a preponderance of the evidence, it is hereby

ORDERED, that the PBGC's Unfunded Benefit Claims are revalued utilizing a 12.3% discount rate at $124,-

441,000 (less any recovery by the PBGC on duplicative Claims).

DATED this 27th day of November, 1995.

/s/ Judith A. Boulden
JUDITH A. BOULDEN
United States Bankruptcy Judge

[Filed Nov. 18, 1994]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 93-C-744B

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant and
Cross-Appellee,

vs.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*;
and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Appellees and
Cross-Appellants.

OPINION

This bankruptcy appeal came before the Court on Wednesday, October 26, 1994. Susan E. Birenbaum, Israel Goldowitz, Garth D. Wilson, Marc A. Tenenbaum, and William G. Fowler represented the appellant and cross-appellee, Pension Benefit Guaranty Corporation ("PBGC"). Frank Cummings, Scott A. Faust, Steven J. McCardell, and Steven J. Waterman represented appellees and cross-appellants Reorganized CF&I Fabricators of Utah, Inc., *et al.* ("Debtors" or "Reorganized Debtors"). Richard M. Seltzer and Richard Brook represented ap-

pellee and cross-appellant United Steelworkers of America, AFL-CIO-CLC ("United Steelworkers").

BACKGROUND

This appeal and cross-appeal concern liabilities arising from the pension plan ("the Plan") administered by the Reorganized Debtors prior to their filing of chapter 11 petitions. The Plan obligated the Reorganized Debtors to pay fixed pension benefits calculated according to the pay and years of service of each recipient former employee. The Employee Retirement Income Security Act ("ERISA") required the Reorganized Debtors to make annual funding contributions to PBGC based on the actuarial valuation of the benefits the employees earned. PBGC is a corporation owned by the federal government that was established under ERISA to administer pension plan termination and to guarantee payment of certain benefits under terminated pension plans. 29 U.S.C. § 1302 (1985 & Supp. 1994). PBGC obtains funding for its administrative expenses and benefit payments by collecting minimum funding contributions from pension plans, generating investment income, allocating the assets of terminated plans, and recovering on its claims against the administrators of terminated plans. PBGC does not receive general federal revenue. The claims under which PBGC can recover include those for (1) unpaid minimum funding contributions and (2) the amount by which PBGC's benefit payments exceed the value of the Plan's assets at termination (known as "unfunded benefit liabilities").

The Reorganized Debtors failed to make the minimum funding contribution due on September 15, 1990. The Reorganized Debtors filed petitions for reorganization under chapter 11 on November 7, 1990. At the time of filing, the Plan was underfunded by about $200 million. The Reorganized Debtors maintained control over the Plan for about another year but failed to make the mini-

mum funding contributions. On March 19, 1992, PBGC terminated the Plan, and PBGC became the Plan's trustee. PBGC began making payments to beneficiaries of the Plan.

PBGC asserted claims in the bankruptcy court for approximately $71 million in unpaid minimum funding contributions and for approximately $222 million for unfunded benefit liabilities. PBGC argued that its claims were entitled to priority under ERISA and the Internal Revenue Code ("I.R.C.").

In decisions dated November 9, 1992 and December 31, 1992, the bankruptcy court denied PBGC's claim of tax priority on all but a small portion of the amount it sought. Specifically, the decisions included the following holdings that are relevant to this appeal:

- PBGC's claims for unpaid mandatory contributions are not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(B) or tax priority pursuant to 11 U.S.C. § 507(a)(7) because the automatic stay precluded the imposition of a lien.

- PBGC's claims for minimum funding contributions arose pre-petition because the acts giving rise to the Debtors' liability to make those contributions occurred pre-petition.

- PBGC's claims for minimum funding contributions are not entitled to post-petition interest as administrative claims because those contributions were not actual and necessary expenses of preserving the Debtors' estates.

- PBGC's claim for a $3 million portion of the unfunded benefit liabilities is not entitled to tax priority because the termination of the Plan occurred post-petition, and the automatic stay precluded the imposition of the lien provided for by ERISA section 4068(c)(2), 29 U.S.C. § 1368(c)(2).

- PBGC is not entitled to interest on its claims for minimum funding contributions because those contribu-

tions are not post-petition taxes and because administrative expenses are not entitled to interest.

The bankruptcy court's decisions also included the following holdings that are relevant to the cross-appeal:

- PBGC's determination of the valuation of its claims is entitled to deference, and that determination is entitled to "substantial weight" when the court determines whether to allow claims.

- PBGC's claim for minimum funding contributions is disallowed to the extent that it duplicates PBGC's claim for unfunded benefit liabilities.

- Each of the Debtors is jointly and severally liable under ERISA § 4062(a), 29 U.S.C. § 1362(A) [sic].

Following the bankruptcy court's decision, the Debtors emerged from bankruptcy pursuant to a consensual reorganization plan. That plan established reserve funds for the purpose of funding PBGC's recovery in the event it prevails on this appeal. Only those reserve funds will be affected by the outcome of this appeal. PBGC estimates that its losses resulting from the termination of the Plan will be approximately $250 million.

ISSUES ON APPEAL

I. Tax Priority Status of Claim for Minimum Funding Contributions

PBGC argues that the bankruptcy court erred in concluding that its claims for unpaid mandatory contributions are not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(B) or tax priority pursuant to 11 U.S.C. § 507(a)(7). The bankruptcy court found that, although ERISA and the I.R.C. provide for a lien to be automatically imposed 60 days after the amount of unpaid contributions exceeds $1,000,000, the operation of the Bankruptcy Code's automatic stay precluded the imposition of such a lien in this case.

PBGC asserts that I.R.C. § 412(n) does not require perfection of a lien before the amount thereof is entitled to tax priority. According to PBGC, Congress intended to give first priority not to perfected liens (which are entitled to priority under the Bankruptcy Code), but rather to the *amount* of liens that could arise. PBGC further argues that the lien at issue was imposed by operation of statute when the pension plan was established and therefore existed pre-petition. The Reorganized Debtors and the United Steelworkers, on the other hand, argue that the bankruptcy court followed the clear language of I.R.C. § 412(n), that priority is given to the "amount with respect to which a lien is imposed," when it held that the imposition of the lien was blocked by the automatic stay.

ERISA and the I.R.C. provide for a lien that arises on the 60th day after an employer falls more than $1 million behind in making its minimum funding contributions. I.R.C. § 412(n); 29 U.S.C. § 1082(f) (Supp. 1994). ERISA and the I.R.C. further provide that the "amount with respect to which a lien is imposed . . . shall be treated as taxes due and owing the United States." ERISA § 302(f), 29 U.S.C. § 1082(f)(4)(C) (Supp. 1994); I.R.C. § 412(n)(4)(C), 29 U.S.C. § 412(n)(4)(C) (1985). The Bankruptcy Code gives first priority to certain taxes as administrative expenses under 11 U.S.C. § 503(b)(1)(B), and seventh priority to certain other taxes pursuant to 11 U.S.C. § 507(a)(7).

The priority provided by these statutes, as the bankruptcy court held, never arose in this case due to the operation of the automatic stay. The automatic stay precludes "any act to create, perfect, or enforce any lien against property of the estate" and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(4), (5) (1993). The bankruptcy court

followed the clear language of I.R.C. § 412(n) and 29 U.S.C. § 1082(f) when ruling that liens arise 60 days after the day that the unpaid contributions amount to $1 million and when determining that tax priority is given only to liens, not to the amount of claims that never become liens.

II. Timing of Minimum Funding Contributions

PBGC argues that the bankruptcy court erred in holding that PBGC's claims for minimum funding contributions arose pre-petition rather than when the quarterly payments became due. The bankruptcy court held that the transaction giving rise to the Debtors' liability for contributions was the pre-petition labor of the Debtors' employees. PBGC argues that the unpaid contributions that came due post-petition should be given first priority as post-petition taxes, and that the contributions Debtors failed to make pre-petition are entitled to seventh priority as pre-petition taxes.

The bankruptcy court correctly analyzed the Reorganized Debtors' liability by examining the time at which the consideration for that liability occurred. In this case, the acts that gave rise to the Debtors' liability to pay mandatory contributions to PBGC is the performance of labor by the Debtors' employees. *LTV Corp. v. Pension Benefit Guaranty Corp. (In re Chateaugay Corp.)*, 115 B.R. 760, 772-78 (Bankr. S.D.N.Y. 1990). Because the performance of labor occurred pre-petition, the liability to PBGC arose pre-petition.

III. Administrative Expense Priority Status for Minimum Funding Contribution Claims

PBGC asserts, as an alternative to the argument that its claims for minimum funding contributions are entitled to tax priority, that $37,680,574 of those unpaid contributions are entitled to administrative expense priority. The Reorganized Debtors and the United Steelworkers argue

that the bankruptcy court correctly determined that those claims were not administrative because minimum funding contributions did not benefit the Reorganized Debtors.

On appeal, PBGC argues that contributions to pension plans qualify as administrative expenses because they are a "cost of doing business" during a reorganization. PBGC relies on Section 507(a)(1) of the Bankruptcy Code, which defines administrative expenses as "including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 507(a)(1) (1993). According to PBGC, the list in Section 507(a)(1) is not exclusive due to the word "including." PBGC also contends that the costs of compliance with regulatory schemes qualify as administrative expenses.

The Tenth Circuit has established the following two-part test for determining which claims qualify as administrative expenses:

> an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.

In re Amarex, Inc., 853 F.2d 1526, 1530 (10th Cir. 1988). This is the test the bankruptcy court applied below. The bankruptcy court correctly ruled on the basis of this test that the claims arising from the Reorganized Debtors' failure to pay pre-petition mandatory contributions are not entitled to priority as administrative expenses. Although the payment of minimum funding contributions may create some good will among employees, making those payments is not "beneficial to the debtor-in-possession in the operation of the business" as that language has been interpreted in the relevant case law. Furthermore, the payments arise out of a transaction between

the employees and the Reorganized Debtors rather than a "transaction between the creditor and the bankrupt's trustee or debtor in possession."

IV. Post-Petition Interest on Minimum Funding Contribution Claims

PBGC argued below that, because its claim for unpaid mandatory contributions is entitled to tax priority, PBGC is also entitled to interest on the amount of that claim. The bankruptcy court denied post-petition interest on those claims.

On appeal, PBGC asserts that it is "well settled" that interest on post-petition taxes is entitled to administrative priority. The Reorganized Debtors and the United Steelworkers argue that PBGC is not entitled to interest on its mandatory contributions claim because (1) those claims do not qualify for tax priority; (2) administrative expense claims are not entitled to interest; and (3) unsecured creditors are not entitled to interest unless the debtors are solvent.

This issue is related to the question whether PBGC's claims for minimum funding contributions are entitled to tax or administrative expense priority. Consistent with this Court's denial of PBGC's claim for tax or administrative priority, this Court also upholds the bankruptcy court's denial of interest on those claims.

V. Tax Priority Claim for Unfunded Benefit Liabilities

PBGC contends that the bankruptcy court erroneously denied tax-priority status to its $3 million claim for unfunded benefit liabilities. The tax-priority status of that claim, according to PBGC, derives from a statutory lien that attaches to all property rights held by the Debtors. The amount of that lien cannot exceed one-third of the Debtors' collective net worth. PBGC asserts that the unfunded benefit liabilities in this case amount to $222,866,000 Due to the statutory limitations, PBGC seeks a

priority claim of only $3 million, or about one-third of the Debtors' estimated collective net worth of about $10 million.[1]

The bankruptcy court held that PBGC's $3 million claim is not entitled to tax priority because the termination of the Plan occurred post-petition, and the automatic stay precluded the imposition of the lien provided for by ERISA section 4068(c)(2), 29 U.S.C. § 1368(c)(2). According to PBGC, the bankruptcy court erroneously failed to follow the proposition that "the portion of the liability . . . to which the lien pertained was *itself* a tax, entitled to priority in bankruptcy." Tax priority is not preconditioned on the attachment or perfection of a lien, according to PBGC. PBGC asserts that Congress' capping of the lien at 30 percent of the Debtors' net worth shows that Congress took into consideration the burden that creating a priority in favor of PBGC would have on other creditors.

The bankruptcy court was correct, as the Reorganized Debtors and the United Steelworkers urge, in holding that tax priority arises only as to those unfunded benefit liabilities to which a lien is imposed, and that the automatic stay precluded the creation of the statutory lien. Like claims for minimum funding contributions, claims for unfunded benefit liabilities are entitled to tax priority only to the extent that a lien for the amount of those claims arises. As to PBGC's congressional intent argument, the better reasoned position is that Congress exhibited its intent to deny tax-priority status to those liabilities to which no liens are imposed by specifically providing tax-priority status to unfunded benefit liabilities to which liens are imposed.

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[1] PBGC concedes that is [sic] has only an unsecured claim for the balance of the unfunded benefit liabilities.

ISSUES ON CROSS-APPEAL

I. Discount Rate

On cross-appeal, the Reorganized Debtors and the United Steelworkers contest the bankruptcy court's deference to PBGC's determination of the method and discount rate to be applied to the unfunded benefit liabilities claim. The cross-appellees claim that the bankruptcy court not only is statutorily required to determine the applicable discount rate in this instance, but also had no need to defer to the agency's expertise because the bankruptcy court often makes such determinations. Furthermore, the cross-appellees maintain that allowing PBGC to self-select an artificially low discount rate unjustifiably inflates PBGC's recovery to the detriment of other unsecured creditors. The Reorganized Debtors and the United Steelworkers assert that the bankruptcy court should not have based its decision on ERISA's policy goals, but should have employed fundamental bankruptcy principles and adopted a prudent investor method.

PBGC maintains that the unfunded benefit liabilities claim should be calculated according to PBGC's valuation as authorized by ERISA in 29 U.S.C. § 1301(a)(18). PBGC asserts that, because Congress did not expressly define the actuarial present value of the guaranteed benefits, Congress defers to agency interpretation unless that interpretation is arbitrary and capricious based on the Supreme Court's ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PBGC proposed a method of valuation which replicates the market price for insurance company close-out annuities for terminated pension plans, and the bankruptcy court accorded PBGC's determination of the method and discount rate "due deference" and "substantial weight" and found that no unfair or unreasonable advantage existed in favor of PBGC.

Neither bankruptcy law nor ERISA expressly states whether the bankruptcy court or PBGC has ultimate

responsibility to determine the actuarial present value of guaranteed benefits in the reorganization context. Nevertheless, principles of statutory interpretation place that responsibility on the bankruptcy court. It is undisputed that both ERISA and the Bankruptcy Code authorize PBGC and the bankruptcy court to determine the discount rate related to pension termination liability. 29 U.S.C. § 1301(a)(18) (Supp. 1994); 11 U.S.C. § 502(b) (1993); *see also In re Chateaugay Corp.*, 115 B.R. 760, 766 (Bankr. S.D.N.Y. 1990), *vacated by consent of the parties*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993). PBGC asserts that because Congress has not spoken to the precise issue, the court must give deference to the agency's interpretation based on agency expertise. However, the bankruptcy court also has vast experience in determining the present value of future payments, if not the precise valuation issue presented here. *See, e.g., In re Hardzog*, 901 F.2d 858 (10th Cir. 1990) (determining present value of future cash flows in Bankruptcy Chapter 12 context); *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503 (9th Cir. 1987) (fixing present value of federal tax claims in Chapter 11 reorganization).

It is well established that where ERISA conflicts with another provision of federal law, ERISA must be subordinated. ERISA explicitly states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1985). In the instant case, ERISA and the Bankruptcy Code conflict. Both PBGC and the bankruptcy court are authorized to make valuations of the claims. However, the bankruptcy court has an additional mandate to advance the principle of equality of treatment between similarly situated creditors. 11 U.S.C. § 1123(a)(4) (1993). Thus, ERISA must be subordinated to the Bankruptcy Code, and the present value calculations relating to pension termination liability

must be determined according to bankruptcy law. The bankruptcy court applied the wrong standard of review in giving deference to PBGC's interpretation.

The bankruptcy court concluded that the method proposed by PBGC is appropriate in this instance only after holding an evidentiary hearing at which expert witnesses testified as to various methods for calculating discount rates, as well as acknowledging its obligation to determine the present value of PBGC's claims in accordance with the overriding policy goals embodied in the Bankruptcy Code. Nevertheless, the bankruptcy court's application of an improper standard of review may have prevented the bankruptcy court from fulfilling its statutory obligation to independently ascertain an appropriate discount rate. The bankruptcy court's legal conclusion that deference was due PBGC's interpretation is reversed and remanded to the bankruptcy court to make an independent evaluation.

II. Duplication of Claims

The Reorganized Debtors and the United Steelworkers challenge the bankruptcy court's order giving PBGC credit for the probable value, rather than the face value, of the minimum contribution claims. However, parties may not invoke the judicial power of the court unless the challenge raises an actual case or controversy. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 1559, 56 L.Ed.2d 30 (1978). If a claim is "so insubstantial or so clearly foreclosed by prior decisions," then the claim may not proceed. 98 S.Ct. at 1560. Because the bankruptcy court entirely disallowed the pre-petition portion of PBGC's minimum contribution claim, the underlying economic result is the same as if the cross-appellees prevail upon the duplication issue. Therefore, the duplication issue is foreclosed by the bankruptcy court's prior order and is moot.

III. Joint and Several Liability

The Reorganized Debtors contend that the bankruptcy court erred by applying joint and several liability. According to the Reorganized Debtors, requiring each of the Debtors to bear full responsibility for liability translates into a tenfold recovery for PBGC, while other unsecured creditors realize a single recovery. The Reorganized Debtors contend this violates bankruptcy principles of equal distribution among creditors and allows PBGC to unfairly inflate its claims. Furthermore, the Reorganized Debtors claim that joint and several liability is incongruous with ERISA's principles of controlled group liability, which treats commonly controlled businesses as one employer for liability purposes. The Reorganized Debtors also argue that the Congress expressly provides that ERISA is subordinate to bankruptcy law under 29 U.S.C. § 1144(d).

PBGC maintains that the Debtors are properly obligated for joint and several liability under ERISA, which governs the validity and amount of these claims. PBGC asserts that the plain language of ERISA clearly imposes joint and several liability. PBGC denies that it is similarly situated to other creditors, conversely, it has a statutory claim against each of the ten debtors, not just one.

"As in any case of statutory interpretation, we begin with the plain language of the law." *Federal Deposit Insurance Corp. v. Canfield*, 957 F.2d 786, 787 (10th Cir. 1992) (citing *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 2803, 115 L.Ed.2d 976 (1921)). Under ERISA, Congress expressly provides:

> In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability

> under this section. The liability under this section of all such persons shall be joint and several.

29 U.S.C. § 1362(a) (Supp. 1994); *accord* I.R.C. § 412 (c)(11)(B) (1988 & Supp. 1994); 29 U.S.C. § 1082 (c)(11)(B) (Supp. 1994). Next, " '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Federal Deposit Insurance Corp.*, 957 F.2d at 787 citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990 (citation omitted)).

Here, Congress has clearly provided for the imposition of joint and several liability against the Reorganized Debtors, and it has not expressed any explicit, contrary legislative intent. Furthermore, PBGC's position is consistent with the case law. *See Tavery v. United States*, 897 F.2d 1032 (10th Cir. 1990) (regarding claims against joint obligors as distinct and separate, including application to joint income tax returns). The bankruptcy court aptly stated that ERISA's express mandate of joint and several liability "may well impact adversely on other creditors, but the principles of equal distribution to creditors are not so offended as to override the direct intent of Congress under ERISA." (Bankr. Ct.'s Mem. Decision & Order, dated 10/2/92 at 9.) This Court affirms the bankruptcy court's order allowing joint and several liability.

CONCLUSION

On PBGC's appeal, all aspects of the bankruptcy court's decisions are AFFIRMED except that portion concerning the duplication of claims, which is moot. As to the cross-appeal, all decisions of the bankruptcy court are AFFIRMED with the exception of the bankruptcy court's determination of the appropriate discount rate. To the extent the bankruptcy court deferred to PBGC in arriving at the appropriate discount rate, such deference was improper. As to that issue only, the case is REMANDED

for an independent discount rate determination without any deference to the position of PBGC.

Dated this 17th day of November, 1994.

/s/ Dee Benson
DEE BENSON
United States District Judge

[Filed May 21, 1993]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jointly Administered
Under Case No. 90B-6721

Chapter 11

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Debtors.

(Case No. 90B-6721)
(CF&I Fabricators of Utah, Inc.)
(Case No. 90B-6722)
(Colorado & Utah Land Company)
(Case No. 90B-6723)
(Kansas Metals Company)
(Case No. 90B-6724)
(Albuquerque Metals Company)
(Case No. 90B-6725)
(Pueblo Metals Company)
(Case No. 90B-6726)
(Denver Metals Company)
(Case No. 90B-6727)
(Pueblo Railroad Service Company)
(Case No. 90B-6728)
(CF&I Fabricators of Colorado, Inc.)
(Case No. 90B-6729)
(CF&I Steel Corporation)
(Case No. 90B-6730)
(The Colorado and Wyoming Railway Company)

ORDER ON MOTION OF PENSION BENEFIT GUARANTY CORPORATION, DATED 1/11/93, FOR RECONSIDERATION AND ALLOWANCE OF RECALCULATED CLAIMS

The Motion of Pension Benefit Guaranty Corporation ("PBGC"), Dated 1/11/93, for Reconsideration and Allowance of Recalculated Claims (the "Motion for Reconsideration") came on for hearing on February 25, 1993 at 10:00 a.m. Appearing on behalf of PBGC were Robert D. Merrill, John R. Labovitz and Frank H. McCulloch II. Appearing on behalf of the Debtors were Edward A. Scallet and Lon A. Jenkins. Appearing on behalf of the Unsecured Creditors' Committee was Steven T. Waterman. The Court's findings were stated on the record and are incorporated herein by reference. Based upon the pleadings filed, the prior Orders of this Court dated November 9, 1992 and December 31, 1992, and the argument of counsel and the evidence presented at the hearing with respect to the calculation of PBGC's Unfunded Benefit Liability Claim,

IT IS HEREBY ORDERED that Motion for Reconsideration is denied; and

IT IS FURTHER ORDERED that PBGC's recalculated Unfunded Benefit Liability Claim is allowed as a general unsecured claim in the amount of $220,953,000 and;

IT IS FURTHER ORDERED that the prior Orders of this Court dated November 9, 1992 and December 31, 1992 are incorporated into this final Order by reference.

DATED this 20 day of May, 1993.

BY THE COURT:

/s/ Judith A. Bolden
HONORABLE JUDITH A. BOULDEN
United States Bankruptcy Judge

Approved as to form:

/s/ Lon A. Jenkins
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[Filed Dec. 31, 1992]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jointly Administered Under [sic]
Under Case No. 90B-6721
[Chapter 11]

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Debtor.

(Case No. 90B-6721)
(CF&I Fabricators of Utah, Inc.)
(Case No. 90B-6722)
(Colorado & Utah Land Co.)
(Case No. 90B-6723)
(Kansas Metals Company)
(Case No. 90B-6724)
(Albuquerque Metals Company)
(Case No. 90B-6725)
(Pueblo Metals Company)
(Case No. 90B-6726)
(Denver Metals Company)
(Case No. 90B-6727)
(Pueblo Railroad Service Company)
(Case No. 90B-6728)
(CF&I Fabricators of Colorado, Inc.)
(Case No. 90B-6729)
(CF&I Steel Corporation)
(Case No. 90B-6730)
(The Colorado and Wyoming Railway Company)

MEMORANDUM DECISION AND ORDER FROM EVIDENTIARL HEARING RELATING TO DEBTORS' OBJECTIONS, DATED 10/02/92, TO TWENTY AMENDED PROOFS OF CLAIM FILED BY PENSION BENEFIT GUARANTY CORPORATION

On November 9, 1992, this court ruled on certain legal issues related to the objections raised by these debtors-in-possession (Debtors')[1] and the Official Unsecured Creditors Committee (Committee) to twenty amended proofs of claim filed by the Pension Benefit Guaranty Corporation (the PBGC)[2]. The court allowed the PBGC's claims against these Debtors on a joint and several basis, but ruled that certain portions of the PBGC's claims were not entitled to priority status as taxes due and owing to the United States. The court denied the PBGC's claims pre-petition priority or post-petition administrative status except to the extent such claims represented "normal pension costs." The court reserved for an evidentiary hearing the allowed amount of the claims, whether there existed any equitable grounds for the court to modify the present value of a portion of the PBGC's claims, and the extent to which the PBGC's claims were duplicative. If the court found that grounds existed for modification of the PBGC's claims, the parties were to present evidence regarding the appropriate interest rate or other applicable adjustments.

An evidentiary hearing was held on the remaining factual issues on November 10, 12 and 30, 1992. The court has weighed the evidence adduced at the hearing, considered the arguments of counsel, and has made an independent review of applicable case law. Now being fully informed, the court determines that the PBGC has

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[1] The Debtors in these jointly administered Chapter 11 cases are related steel production companies.

[2] The PBGC is a wholly-owned United States government corporation required to guarantee payment of non-forfeitable or vested benefits under terminated pension plans.

met its burden of proving the substance of portions of its claims according to applicable non-bankruptcy law, and that the claims are allowed in part, subject to the modifications set forth below.

JURISDICTION

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O) as a matter involving the administration of the estate, the allowance and priority of claims and the adjustment of the debtor-creditor relationship. The matter is before the court under Rule 404(a) of the United States District Court for the District of Utah. Rule 404(a) automatically refers bankruptcy cases and proceedings to this court for hearing and determination.

BURDEN OF PROOF

The PBGC's claims are allowed pursuant to 11 U.S.C. § 502(a) unless a party in interest objects. Upon objection, the court shall determine the amount of the claim pursuant to 11 U.S.C. § 502(b). The Debtors have produced evidence indicating that the PBGC may have calculated its claims in amounts that are excessive. The Debtors' evidence is equal in probative force to that underlying the PBGC's claims, thus shifting the burden to the PBGC to prove its claims generally. *Fullmer v. United States (In re Fullmer)*, 962 F.2d 1463, 1466 (10th Cir. 1992), citing *In re Wells*, 51 B.R. 563, 566 (D. Colo. 1985). Substantive federal law determines the validity of the PBGC's claims. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 657-8 (1991). The PBGC must prove its claims by a preponderance of the evidence. *Wells*, 51 B.R. at 567.

HISTORY OF THE CASE [3]

At the time of filing, the Debtors were sponsors and CF&I Steel Corporation (CF&I) was the administrator of

[3] The facts of the case are more fully set forth in the prior opinion of the court dated November 9, 1992.

two pension plans. CF&I promised to provide fixed pension benefits under these plans that would be calculated with reference to each employee's pay and years of service. CF&I was obligated to provide annual plan funding contributions based on the actuarial valuation of the benefits earned by its employees. CF&I failed to make the minimum funding payment that became due on one of the plans (Master Plan) on September 15, 1990. On November 7, 1990, the Debtors filed petitions for reorganization under chapter 11 of the United States Bankruptcy Code.

On March 19, 1992, the PBGC instituted proceedings to terminate the Master Plan. CF&I consented to the termination on behalf of the Master Plan, and entered into a trusteeship agreement with the PBGC effective March 19, 1992. Pursuant to this agreement, the PBGC became the successor trustee of the Master Plan. The PBGC also became liable for guaranteed benefits to plan participants.

The PBGC filed two proofs of claim against each of the Debtors in connection with the Master Plan. These claims fall into two general categories: (1) claims for due and unpaid minimum funding contributions allegedly due and owing the Master Plan pursuant to 29 U.S.C. § 1082 (ERISA § 302), and 26 U.S.C. § 412 (I.R.C. § 412) (the Minimum Contribution Claims); and (2) claims on behalf of the PBGC for unfunded benefit labilities [sic] under the Master Plan pursuant to 29 U.S.C. § 1362 (the Unfunded Benefit Claims) designed to reimburse the PBGC for at least a portion of the amounts that it must pay to pensioners (collectively the Claims).

On July 31, 1992, after termination of the Master Plan, the PBGC amended its proofs of claim. The amendments increased the amount of each of the ten Minimum Contribution Claims to an estimated amount of $64,874,511, and the amount of each of the ten Unfunded Benefit Claims to an estimated amount of

$263,200,000. At closing argument, the PBGC asserted that the evidence supported allowance of the following claims: 1) pre-petition normal pension costs of $429,232 pursuant to 11 U.S.C. § 507(a)(4); 2) post-petition normal pension cost for the period from November 7, 1990 to March 19, 1992, of $1,565,198 pursuant to 11 U.S.C. § 507(a)(1); 3) general unsecured claims for the balance of the unpaid Minimum Contribution Claims of $69,228,372; and 4) general unsecured claims for the Unfunded Benefit Claims of $212,286,000. The $212,286,000 figure represented the present value of Master Plan liabilities on the date of plan termination, less the value of plan assets on that same date, and less the value of the unpaid Minimum Contributions Claims to be paid through the Debtors' proposed plan.

MINIMUM CONTRIBUTION CLAIMS

1. Total Minimum Contribution Claims.

The unpaid Minimum Contribution Claims were computed as of the March 19, 1992, termination date of the Master Plan. They reflect the differenec between the minimum funding requirements that the enrolled actuary for the plan certified CF&I must contribute to the Master Plan, and the amounts actually contributed. The PBGC, through its independent contract actuary, relied upon the work and assumptions of the enrolled actuary for the Master Plan contained in Schedules B of the 1988, 1989, and 1990 actuarial reports to make the calculations for the Claims. The PBGC also received from the Master Plan's enrolled actuary, and relied upon, cost pages from a draft of the 1992 actuarial valuation report and a 1991 draft actuarial report. Based upon that updated information the PBGC recalculated the total due and unpaid Miniumum Contribution Claims at $71,222,802. Although the updated 1991 and 1992 information was in draft form, there was no contradictory evidence to indicate that the data was erroneous or unreliable. To the extent

that the data supplied by the draft report was the basis for calculation of portions of the Minimum Contribution Claims, it is credible evidence of the amount of the claims unless refuted or impeached.

2. Calculation of normal pension costs for purposes of determining 11 U.S.C. § 507(a)(4) priority claim.

The court previously determined that a portion of the Minimum Contribution Claims representing normal pension costs [4] would be allowed 11 U.S.C. section 507(a)(4) priority status. The parties stipulated that the normal pension costs, for the 180 days prior to filing bankruptcy, were $429,232. The parties disagree regarding the method of calculating what portion of the normal pension costs should be allowed priority status under 11 U.S.C. § 507(a)(4).

The first component of the equation provided by 11 U.S.C. § 507(a)(4) is the calculation of the maximum amount of allowed unsecured claims for contributions to employee benefit plans; in this case the normal pension costs. This maximum amount is then reduced by the amount of the second component, the actual distribution under 11 U.S.C. § 507(a)(3). The Debtors' method of calculation based on pension plan contributions attributable to each employee on an individual basis reduces the PBGC's entire pre-petition normal pension costs claims by $9,457.03. This amount equals the total amount of pension plan contributions attributable to individual employees in excess of a $2,000 limit for each employee. The PBGC argues that the statute should be interpreted to provide a maximum allowable contribution claim calculated by multiplying 1856 (number of employees)[5] by $2,000. That amount is $3,712,000. The PBGC argues

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[4] Normal pension cost is an actuarial term that consists of the present value of the benefits paid in the future allocated in today's dollars to a particular year under the employers funding method.

that because the pre-petition normal pension costs are $429,232, an amount much smaller than $3,712,000, the entire $429,232 claim for normal pension costs is well within the maximum amount allowed by 11 U.S.C. § 507(a)(4).

The court agrees with the PBGC's interpretation. The wording of the statute is quite specific and should be afforded its plain narrow meaning. *In re Pittston Stevedoring Corp.*, 40 B.R. 424, 428 (Bankr. S.D.N.Y. 1984). The statute provides an aggregate figure for the maximum amount of contribution claims arising from services performed within 180 days before the petition date for each plan. The maximum allowable claim is not based on an employee specific calculation.

The second component of the equation provided by 11 U.S.C. § 507(a)(4) is determined by subtracting the aggregate distribution to employees under 11 U.S.C. § 507(a)(3) from the normal pension costs. The amount of allowed unsecured claims for contributions to employee benefit plans entitled to administrative priority is tied directly to the 11 U.S.C. § 507(a)(3) wage priority claims. *In re Unimet Corp.*, 100 B.R. 881, 886 (Bankr. N.D. Ohio 1988).

The Debtors paid current wages due and owing to their employees by issuing cashier's check on November 6, 1990, the day prior to filing, in order to avert a strike or other labor disturbance. If the Debtors had not paid the wages current on November 6, 1990, the wage claims up to the amount of $2,000 per employee would have had priority wage status pursuant to 11 U.S.C. § 507(a)(3).

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[5] Debtors' Exhibit 1 provded the number of employees included in the calculation. The Debtors prepared an exhaustive accounting of the accrued wage claims paid pre-petition, allocation of normal pension costs and amount of 11 U.S.C. § 507(a)(3) priority claim available to each employee.

The effect of the payment of all wage claims prior to filing was to eliminate any offset under 11 U.S.C. § 507(a)(3) against the maximum allowable pension plan contributions payable under 11 U.S.C. § 507(a)(4). As of the date of filing, there were no unsecured and unpaid 11 U.S.C. § 507(a)(3) priority wage claims against the Debtors' estate.

The Debtors argue that they could bring preference actions against their employees to recover the wages paid pre-petition and then seek court approval for priority payment of the wage claims. By extension, the same argument could be applied to recover all wages to the extent of $2,000 paid to employees within the 90 day period prior to the petition date. There is no logical reason this argument should be limited only to the amounts paid by the Debtors on November 6, 1990. Alternatively, the Debtors argue that the cashier's checks would not have been presented for payment until November 7, 1990, at the earliest, and extending the holding of *Barnhill v. Johnson (In re Antweil)*, 112 S.Ct. 1386 (1992), the cashier's checks represented post-petition 11 U.S.C. § 507(a)(3) payments. In *Barnhill*, the Supreme Court held that for purposes of establishing a voidable preference under 11 U.S.C. § 547(b), the transfer of a check occurs when the check is honored by the drawee bank.

The evidence indicated that the cashier's checks were issued and mailed on November 6, 1990, but there was no credible evidence as to the date of delivery. A cashier's check, unlike the check at issue in *Barnhill*, is the legal equivalent of currency. *In re Kimball*, 16 B.R. 201, 203 (Bankr. S.D. Fla. 1981). A certified check constitutes an immediate assignment of funds, and, therefore, is payment of the underlying debt. *In re Midwest Boiler & Erectors, Inc.*, 54 B.R. 793, 795 (Bankr. E.D. Mo. 1985). Because there is no significant difference between cashier's

checks and currency, payment occurs upon delivery. *Kimball,* 16 B.R. at 203.

The court will not accept the Debtors' rationalization because it flies in the face of the facts, defeats the clear language of the statute and advances alternatively inconsistent positions. Payment of unpaid wage claims by cashier's check one day prior to the petition date either eliminated all priority wage claims under 11 U.S.C. § 507(a)(3) or, as a logical extension of the Debtor's alternative argument, it represented an unauthorized post-petition distribution of estate assets to pre-petition creditors. The evidence does not adequately establish a post-petition delivery date for the cashier's checks. Furthermore, the testimony does establish that the Debtors' made a calculated business decision to issue wage payments prior to the petition date.

Because no allowed unsecured wage claims existed on the date of filing, there could be no distribution under 11 U.S.C. § 507(a)(3), and the Claims cannot be reduced by the $85,019.28 pre-petition distribution to employees. Based on the testimony and evidence before the court, the PBGC's total priority claim under 11 U.S.C. § 507(a)(4) is $429,232.

3. Normal pension costs as post-petition administrative claims pursuant to 11 U.S.C. § 507(a)(1).

Evidence indicates that the normal pension costs that accrued post-petition are as follows: for 1990 a pro-rated figure for the post-filing period of $119,653 [6]; for 1991 a total of $1,150,902; and for 1992 the amount of $294,643 up to the date of plan termination. The post-petition normal pension costs total $1,565,198. The Debtors argued that these figures are based upon draft

[6] $808,767 representing the normal costs for the entire year of 1990, divided by .147945 representing 54/365, the number of days left in the year after the date of filing.

actuarial reports that were not signed by the enrolled actuary for the plan. They failed, however, to present evidence that the figures were incorrect or to present credible evidence that the PBGC's calculations of the post-petition normal pension costs were erroneous. The evidence presented by the PBGC preponderates. Based on the testimony and evidence before the court, the PBGC's total administrative claim under 11 U.S.C. §§ 503(b)(1)(A) and 507(a)(1) is $1,565,198.

4. Interest on the Unsecured Portion of the Minimum Contribution Claims.

The evidence indicated that $69,228,372 of the Minimum Contribution Claims not attributable to normal pension costs was calculated according to 26 U.S.C. § 412 (I.R.C. § 412) using an interest factor to both discount the amount and to "get us to an appropriate place in time." (Dezube, transcript November 10, 1992, p. 41.) To the extent an interest factor is used to discount the claim to present value, it reflects the appropriate methodology provided by substantive law to calculate the PBGC's claim. However, the evidence indicates that interest was also used to bring the claim forward in time and that the claim includes interest that allegedly accrued as a result of the Debtors' failure to make contributions to the Master Plan after the filing date.

The PBGC's exhibit 8 (Exhibit) purported to itemize the components of its $71,222,802 Minium Contributions Claims.[7] The Exhibit summarized the dates and amount of each contribution due to the Master Plan, as well as a summary of contributions actually made by the Debtors from the beginning of 1989 and forward through 1993. The Exhibit then purported to total the amount of the Minimum Contribution Claims. The Exhibit includes

[7] Amounts due and credits reflected in the Exhibit do not total the Minimum Contribution Claim of $71,222,802 illustrated by the Exhibit.

amounts after the date of the filing of the chapter 11 petitions, as well as amounts after termination of the Master Plan. It also includes contributions due and credits for contributions made through 1993.

The testimony regarding the calculation described by the Exhibit indicated that over $5,000,000 of the $71,222,802 claim itemized in the Exhibit included interest attributable to contributions due after termination of the plan. It is impossible to determine from the evidence what specific portions of the Minimum Contribution Claims are attributable to post-petition interest. The PBGC argues that the Internal Revenue Code requires it to include interest in the calculation of its Minimum Contribution Claims. Although the substantive law may control calculation of the PBGC's claim, it does not allow accrual of interest in derogation of the rights of other unsecured creditors. Post-petition interest on the pre-petition portion of the Minimum Contribution Claims will not be allowed. *United States v. Fullmer (In re Fullmer)*, 962 F.2d 1463, 1467 (10th Cir. 1992) (unmatured interest is disallowed against estate pursuant to 11 U.S.C. § 502(b)(2)); *see also, In re Kentucky Lumber Co.*, 860 F.2d 674, 676-79 (6th Cir. 1988); *In re Burgess Wholesale Mfg. Opticians, Inc.*, 721 F.2d 1146, 1147 n.1 (7th Cir. 1983).

The Exhibit also appears to include amounts for minimum funding contributions that came due after the PBGC terminated the Master Plan. All of the testimony and argument referred to the Debtors' liability to the PBGC and the Master Plan as of the March 19, 1992, termination date. The PBGC offered no explanation nor evidence why post-termination funding requirements were included in the calculation contained in the Exhibit. The PBGC's claims should have been calculated as of the date of plan termination after which the Debtors were no longer liable to make contributions to the Master Plan. The PBGC's apparent inclusion of post-termination minimum funding

payments in the Exhibit is inexplicable and without evidentiary support.

Neither the testimony, the Exhibit, nor reference to any other specific exhibit, clarified the source of the figures set forth on the Exhibit or precisely how the $69,228,372 was calculated. The evidence only indicated that the figures contained post-petition interest, post-termination charges, and charges attributable to amounts due in the future. The PBGC argues that it is not possible, nor is it required, to allocate its Claims. To the contrary, the burden has shifted to the PBGC to prove the validity of all aspects of its proofs of claim rather than the Debtors having the burden of proving the Claims' invalidity. *In re Lewis*, 80 B.R. 39, 43 (Bankr. E.D. Pa. 1987) (mortgagee's claim for late charges would be disallowed absent showing of how charges were computed). The PBGC is required to prove all elements of its Claims or those portions not proven by the creditor must be disallowed. The Exhibit is generally of no probative value and the evidence is insufficient to establish the correct amount of the Minimum Contributions Claims. The PBGC has not met its burden to prove the Minimum Contrbutions Claims by a preponderance of the evidence. Based upon the lack of credible evidence regarding the components of the $69,228,372 portion of the Minimum Contribution Claims, $69,228,372 of the claim will be disallowed.

UNFUNDED BENEFIT CLAIMS

The Unfunded Benefit Claims are equal to the excess of the benefits promised to the Debtors' current and former employees in today's dollars over the current value of funds in the trust fund at plan termination. The factual issues regarding the amounts of these claims relate to the method used by the PBGC to compute the value of its claims, and whether there is an improper duplication between the Unfunded Benefit Claims and the Minimum Contribution Claims.

1. Applicable rate and retirement age assumptions.

The PBGC, through its contract actuary, calculated the Unfunded Benefit Claims by using figures provided by the Master Plan's enrolled actuary. The Master Plan's enrolled actuary computed the figures using one set of assumptions. The PBGC actuary converted the figures to a different amount using a different set of assumptions. Those revised assumptions were calculated according to the provisions of 29 C.F.R. § 2619 (1991) (Regulation) applicable at the time of plan termination. The purpose of the Regulation is to establish a method of determining the value of plan benefits under terminating pension plans covered by the Employee Retirement Income Security Act of 1974. The Regulation determines the current value of projected benefits as of a specific date that is equal to the amount of money needed on that date to pay benefits over future years. The Regulation requires the plan administrator to determine the present value of all plan benefits using the applicable formulas contained in the Regulation, or any other formulas or approximations that are at least as accurate, together with prevailing PBGC interest, expected retirement age, and mortality rates in effect at the valuation date.

The Debtors challenged the expected retirement age used in the calculation as not representative of the actual experience of this plan, especially during the plan's pre-termination period. Pre-termination evidence is not conclusive as it relates to this plan or the experience of the plan once terminated. The court finds the more credible evidence of the expected retirement age under terminated plans is that experienced by the PBGC [sic] The PBGC is familiar with a multitude of terminated plans as compared to the Debtors' experience with this specific plan in the seven month post-termination period.

The Debtors also challenged the method used by the PBGC in discounting its claims to present value. The PBGC used as a component of that calculation a 6.5%

interest rate.[8] The interest rate, adjusted periodically by the PBGC, reflects current conditions in the financial and annuity markets. The most recent recalculation applicable here raised the highest portion of the interest rate from 6 1/4% to 6 1/2%.[9] The Regulation replicates the market price from an insurance company for the close out of annuities from a terminated pension plan. The Regulation produces a discount factor, not an interest rate. The interest rate is applicable only in conjunction with the other factors set forth in the Regulation. There is no evidence the PBGC improperly calculated the Unfunded Benefit Claims according to the Regulation. There is only a dispute regarding whether the interest rate and expected retirement age assumptions should be employed in this case to discount the Claims.

The Debtors introduced evidence to illustrate that in light of the PBGC's historical record of its investment activity, the use of the 6.5% rate would disproportionately favor the PBGC and would result in the PBGC receiving a profit from the estate at the expense of other creditors. The Debtors advocated two alternative interest rates to substitute for the PBGC's 6.5% rate. Evidence was presented of a debtor-specific approach that generated a rate of 13.4%, and a prudent-investor approach that generated a rate of 12.3%. If the Unfunded Benefit Claims were calculated using the 13.4% interest rate instead of the PBGC's 6.5% interest rate, the PBGC's claim would be reduced to approximately $114,398,000, almost one-half of the amended Claims. If the Unfunded Benefit

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[8] The evidence indicates that the 6.5% figure is applicable to only a part of the calculation, but because it is the largest percentage used, will be referred to simply as the 6.5% rate.

[9] The adjustment to the interest rate is not subject to notice and public comment. The PBGC indicated that to do so would be impracticable and contrary to public interest because the issuance of new interest rates must be done promptly so that the rate can reflect, as accurately as possible, current market conditions.

Claims were calculated using the 12.3% interest rate instead of the PBGC's 6.5% interest rate, the PBGC's claim would be reduced to approximately $124,441,000. The significance of the impact on other unsecured creditors compels the court to weigh the evidence to determine whether the PBGC's calculation of its Claims unjustifiably inflates its Claims to the detriment of the balance of the creditors in this case.

The court finds that there is little support for the use of the debtor-specific approach, either in case law or as indicated by the witnesses for both parties. The method uses the pre-bankruptcy credit risk of the financially risky Debtors to derive a rate. Other courts have rejected the approach and the Debtors' expert had little enthusiasm for the method.

The prudent-investor approach attempts to determine what a prudent investor could expect to earn on the portfolio of assets available at the time of termination. The prudent-investor approach allocated the mix of investment of fund assets in a balanced portfolio that contained sixty per cent equities and forty per cent fixed income securities. Such investments would yield 12.3% [sic] The prudent-investor approach was carefully developed analyzing generally accepted source materials used in financial markets and was introduced by a witness qualified by this court as an expert on the calculation of the present value of claims in bankruptcy cases.

The prudent-investor approach, however, fails to account for immediate cash draws against the fund. Since the approach did not include a cash reserve, there was no consideration of how that may affect the yield. The prudent-investor approach also produced a rate that was generally higher than many large pension plans projected they would receive on long term investments. The approach also assumes a risk factor that may be inconsistent with the PBGC's statutory role as a guarantor of pension funds, and fails to provide adequate compensation to the

PBGC for the assumption of additional risk. The Debtors argue that the PBGC has already been compensated for any risk through receipt of premiums previously paid by the Debtors. The court rejects that argument. The Debtors' argument does not account for risk that may be encountered by the PBGC in the future. The PBGC interest rate is also only one part of a three part formula required by the valuation regulations. If one portion of the formula is modified, then the presumptions as to the expected retirement age and the mortality rates also required modification. Utilization of the interest rate set forth in the prudent-investor approach does not replicate the market price from an insurance company for the close out of annuities from a terminated pension plan.

Evidence indicated that the PBGC should not utilize a risk-free rate, but should be allowed a rate that reflects the riskiness of the stream of payments and the organization insuring it. Such a low-risk rate may be equivalent to a federal agency rate rather than the United States treasury rate. No evidence was offered regarding a specific low-risk rate other than the 6.5% interest rate provided by the valuation regulations. The PBGC's interest rate is not designed solely to enhance its claims and the interest rate is not inconsistent with the risk the PBGC should be required to incur.

The court has considered all the evidence relating to the multitude of rates advocated by the parties, and whether equitable factors unique to this bankruptcy filing should influence the selection of that interest rate. Such consideration included recognition of the PBGC's obligation to guarantee performance on all defaulted pensions plans, its obligation to provide conservative investment management, the interrelationship of the various factors used by the PBGC to arrive at an appropriate discount factor, as well as the impact the choice of interest rate has on other creditors. It is undisputed that calculation of the PBGC's Unfunded Benefit Claims according to all

elements of substantive non-bankruptcy law will severely impact the distribution to other similarly situated creditors. That is but one element the court should consider because allowance of one claim almost always adversely impacts the distribution to the remaining creditors in the same class. If, however, the rate employed by the PBGC was designed to improperly enhance the Unfunded Benefit Claims at the expense of the other creditors, the court has authority to modify the rate. *In re Chateaugay Corp.*, 130 B.R. 690, 696 (S.D.N.Y. 1991) (adopting bankruptcy court report and recommendation as giving proper credit to PBGC's ability to calculate value of future liabilities according to agency procedures reported at 115 B.R. 760, 771 (Bankr. S.D.N.Y. 1990)). Reduction in the interest rate used by the PBGC should be done only if there is manifest unfairness or unreasonableness. If not, the PBGC's regulations should be given due deference. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). The court should also be circumspect in engaging in judicial review on a case-by-case basis when a regulatory scheme is devised that takes into consideration a larger constituency. *Dunivent v. Schollett, (In re Schollett)* 1992 WL 347228 (10th Cir., Nov. 25, 1992).

Based upon the weight of the evidence and upon all applicable equitable factors, the court will not disturb the application of the PBGC valuation regulations to this case. The appropriate interest rate to be utilized in discounting the PBGC's Unfunded Benefit Claims to present value is 6.5% utilizing the methodology provided by the Regulation.

2. Claim Duplication

Part of the assets of the Master Plan include the unpaid Minimum Contribution Claims. The court previously ruled that the Unfunded Benefit Claims owed to the PBGC and the Minimum Contribution Claims owed to the Master Plan were disallowed to the extent that they over-

lapped or were duplicative of each other. The amount of the Unfunded Benefit Claims is comprised of the amount of the plan liabilities of $254,300,000, less the value of the plan assets as of the date of termination. The evidence indicates that after offsetting the assets of the terminated plan the amount of the remaining Unfunded Benefit Claims is $222,866,000. This figure does not reflect a reduction for the value for the unpaid Minimum Contributions Claims that are also assets of the plan on the date of plan termination.

The PBGC was able to employ a reiterative process to calculate the value assigned to its $71,223,000 Minimum Contribution Claims pursuant to information contained in the Debtors' proposed plan. The PBGC assigned a value of $11,013,000 to those claims and further discounted the value of the Minimum Contribution Claims to $10,580,000. Subtracting the value of the Minimum Contribution Claims (a plan asset) from the Unfunded Benefit Claims, as calculated by the PBGC, produced a total Unfunded Benefit Claim of $212,286,000. This process does not reduce the Unfunded Benefit Claims by the total amount of the Minimum Contribution Claims. The process used by the PBGC only reduces the Unfunded Benefit Claims by the amount of the PBGC's probable recovery on the Minimum Contribution Claims.

In this case, giving the PBGC credit for the probable value of the Minimum Contribution Claims, a plan asset, as opposed to the dollar amount of the claim, provides the correct determination of the total Unfunded Benefit Claims. The determination of value is analogous to treatment of a secured claim under 11 U.S.C. § 506 where the value of the collateral and, correspondingly the amount of a creditor's secured claim may vary according to the intended use of the property or the purpose for which the valuation is made. *In re Weber*, 140 B.R. 707, 710 (Bankr. S.D. Ohio 1992) (if debt not paid according to its terms, there will be slippage between value of

property, based on appropriate market standard, and amount creditor will receive). The PBGC's calculation of its Minimum Contribution Claims contains the $69,228,372 claim presently disallowed by the court. The reiterative calculation process is not accurate at this point to the extent that it incorporates the total value of the disallowed claim and accounts for a recovery the PBGC will not receive. However, once the PBGC incorporates this correction in its reiterative calculation of the amount of the Minimum Contribution Claims, the methodology eliminates any duplication prohibited by the court's prior order.

Based upon the foregoing, it is hereby

ORDERED, that the allowed amount of normal pension costs entitled to priority under 11 U.S.C. Section 507(a)(4) is $429,232; and it is further

ORDERED, that the allowed amount of normal pension costs entitled to administrative expense status under 11 U.S.C. Section 507(a)(1) is $1,565,198; and it is further

ORDERED, that the remaining amount of the Minimum Contribution Claims in the amount of $69,228,372 is disallowed; and it is further

ORDERED, that the Unfunded Benefit Claims shall be calculated and allowed utilizing the interest rate set forth in the Regulation that was in effect as of the date of the termination of the Master Plan; and it is further

ORDERED, that the unsecured claim for the Unfunded Benefit Claims is allowed in an amount utilizing the reiterative process to value the Minimum Contribution Claims; and it is further

ORDERED, that the PBGC recalculate the amount of the Unfunded Benefit Claims utilizing the reiterative method after adjustment for the disallowance of $69,228,-372 of the Minimum Contribution Claims; and it is further

ORDERED, that if the amount to be received by the PBGC on its Claims pursuant to the Debtors' plan, if confirmed, is further modified by the Debtors or by other factors outside the scope of this opinion, the PBGC shall amend its Claims accordingly to correctly reflect the adjusted recovery.

DATED this 31 day of December, 1992.

/s/ Judith A. Boulden
JUDITH A. BOULDEN
United States Bankruptcy Judge

[Filed Nov. 9, 1992]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jointly Administered Under
Under Case No. 90B-6721
[Chapter 11]

IN RE: CF&I FABRICATORS OF UTAH, INC. *et al.*,
Debtor.

(Case No. 90B-6721)
(CF&I Fabricators of Utah, Inc.)
(Case No. 90B-6722)
(Colorado & Utah Land Co.)
(Case No. 90B-6723)
(Kansas Metals Company)
(Case No. 90B-6724)
(Albuquerque Metals Company)
(Case No. 90B-6725)
(Pueblo Metals Company)
(Case No. 90B-6726)
(Denver Metals Company)
(Case No. 90B-6727)
(Pueblo Railroad Service Co.)
(Case No. 90B-6728)
(CF&I Fabricators of Colorado, Inc.)
(Case No. 90B-6729)
(CF&I Steel Corporation)
(Case No. 90B-6730)
(The Colorado and Wyoming Railway Company)

MEMORANDUM DECISION AND ORDER RELATING TO DEBTORS' OBJECTIONS, DATED 10/02/92, TO TWENTY AMENDED PROOFS OF CLAIM FILED BY PENSION BENEFIT GUARANTY CORPORATION

On November 7, 1990, these related steel production companies (Debtors) filed petitions under Chapter 11, in large part in an attempt to reorganize in light of their inability to fund two "defined benefit" pension plans. Although the Debtors, the Unsecured Creditors Committee (Committee) and the Pension Benefit Guaranty Corporation (PBGC) have been in negotiating relative to the amount and priority of the PBGC's claims arising from the Debtors' inability to fund the plans, the issues are joined and presented to the court for the first time in this claims objection hearing on November 9, 1992, six days prior to the hearing on the adequacy of the Debtors' disclosure statement. Resolution of the legal issues is critical because the Debtors' hopes for reorganization center upon an Asset Purchase Agreement of portions of the Debtors' assets implemented through a proposed plan of reorganization. The prospective purchaser apparently requires resolution by court order of these, and other, issues by Sunday, November 15, 1992, or its participation in the Debtors' reorganization will be withdrawn. In light of these pressing dates, the court has reduced to writing its rationale in determining certain legal issues, although in so doing recognizes that style may succumb to expediency.

FACTS

At the time of filing, the Debtors were sponsors and CF&I Steel Corporation (CF&I) was the administrator of two pension plans which provided pension and pension-related benefits for employees and retirees. These two pension plans are (1) The Pension Plan of CF&I Steel Corporation and Certain Subsidiaries (the Master Plan) and (2) The Non-Contributory Pension Plan of CF&I

Steel Corporation as Amended and Restated Effective January 1, 1989, (the Non-Contributory Plan). Under these pension plans, CF&I promised to provide fixed pension benefits, the amount of which is calculated with reference to each employee's pay and years of service. CF&I was obligated to provide annual plan funding contributions based on the actuarial valuation of the benefits earned by its employees.

PBGC is a wholly-owned United States government corporation established under § 4002 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1302, to administer the pension plan termination provision of Title IV of ERISA, 29 U.S.C. §§ 1302-1461. PBGC is required to guarantee payment of non-forfeitable or vested benefits under terminated pension plans, subject to certain limitations.

CF&I failed to make the minimum funding payment that became due on the Master Plan on September 15, 1990. On November 7, 1990, 23 days after payment of the quarterly minimum funding installment was due, the Debtors filed petitions for reorganization under chapter 11 of the United States Bankruptcy Code (Code). The Debtors' separate cases were later procedurally consolidated for joint administration.

On March 13, 1991, PBGC filed two proofs of claim against each of the Debtors in connection with the Master Plan. These claims fall into two general categories: (1) claims for unfunded benefit liabilities under the Master Plan (the Unfunded Benefit Claims) designed to reimburse PBGC for at least a portion of the amounts that it must pay to pensioners from its own funds, and (2) claims for due and unpaid minimum funding contributions allegedly due and owing the Master Plan (the Minimum Contribution Claims) (collectively the Claims).

The Debtors' attempted to persuade PBGC to terminate the Master Plan both before and after filing the chapter

11 petitions. On March 19, 1992, approximately sixteen months after the bankruptcy filing, PBGC instituted proceedings to terminate the Master Plan. The Non-Contributory Pension Plan has not been terminated. CF&I, on behalf of the Master Plan, consented to the termination and entered into a trusteeship agreement with PBGC effective March 19, 1992. Pursuant to this agreement, PBGC became the successor trustee of the Master Plan. The PBGC also became liable for guaranteed benefits to plan participants.

On July 31, 1992, after termination of the Master Plan, PBGC amended its proofs of claims, increasing the amount of each of the ten Unfunded Benefit Claims to an estimated amount of $263,200,000 [1] and the amount of each of the ten Minimum Contribution Claims to an estimated amount of $64,874,511. PBGC filed the Unfunded Benefit Claims as priority claims. PBGC asserted its priority claim on the premise that the Master Plan had an insufficiency of assets to discharge its benefit liabilities, as defined in ERISA § 4001(a)(18), 29 U.S.C. § 1301 (a)(18).

PBGC asserts that, pursuant to § 4062(b) of ERISA, 29 U.S.C. § 1362(b), each of the Debtors is jointly and severally liable to the PBGC for the amount of Unfunded Benefit Claims on the termination date of the Master Plan, plus interest calculated from that date. PBGC asserts that it has a lien limited to 30% of the collective net worth of the Debtors [2] that arose as of the termination date of the Master Plan. ERISA § 4068(a), 29 U.S.C. § 1368(c)(2). PBGC asserts that in bankruptcy cases, the 30% liability is treated in the same manner as a tax

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[1] The Debtors dispute the amount and have provided more current actuarial data to PBGC that may result in a lower figure.

[2] The collective net worth has not yet been determined by PBGC but it is preliminarily estimated to be approximately $10,000,000. Thus, PBGC asserts the amount subject to a lien is approximately $3,000,000.

due and owing to the United States for purposes of Title 11 of the United States Code. ERISA § 4068(c)(2), 29 U.S.C. § 1368(c)(2). Therefore, the amount of the Unfunded Benefits Claim representing 30% of the Debtors net worth is entitled to administrative expense priority as a tax incurred by the estate pursuant to 11 U.S.C. §§ 503 (b)(1)(B) and 507(a)(1). Alternatively, if the court determines any part of the Unfunded Benefit Claims is not a tax incurred by the estate, PBGC asserts priority for the same amount consisting of 30% of the Debtors' net worth pursuant to 11 U.S.C. § 507(a)(7), with any amount not determined to be entitled to priority to be allowed as a general unsecured claim. The Unfunded Benefit Claims are subject to reduction upon determination by the PBGC of the value of the claim for unpaid minimum funding contributions.

The Minimum Contribution Claims filed by PBGC assert unsecured claims for $1,000,000 with the balance of $63,874,511 as priority unsecured claims. PBGC asserts priority status for these claims because, pursuant to ERISA § 302(f), 29 U.S.C. § 1082(f) and I.R.C. § 412(n), 26 U.S.C. § 412(n), any amount with respect to which a lien is imposed shall be treated as taxes due and owing the United States. Therefore the Minimum Contribution Claims, in an amount estimated to be $50,460,452 plus interest, are entitled to priority pursuant to 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(1). PBGC also asserts that interest on the claims arising prior to and during the administration of the estates is entitled to priority treatment. Alternatively, if the court determines any part of these claims not to be an administrative priority tax, PBGC asserts priority under 11 U.S.C. § 507(a)(7). PBGC asserts that any amounts accruing for unpaid minimum funding contributions from the filing date to the date the plan was terminated, estimated to be $37,680,-574, are entitled to priority pursuant of 11 U.S.C. §§ 503 (b)(1)(A) and 507(a)(1). Debt for unpaid minimum funding contributions that is attributable to the 180 days

prior to the filing of the chapter 11 petitions, estimated to be $8,164,995, is entitled to priority treatment pursuant to 11 U.S.C. § 507(a)(4). A remaining portion of the claims estimated to be in the amount of $13,414,059 is asserted by PBGC to be entitled to priority under 11 U.S.C. § 507(a)(7). The balance of the claims in the amount of $1,000,000 is a general unsecured claim.

On October 2, 1992, the Debtors, supported by the Committee,[3] filed objections to the twenty Claims, setting hearings thereon for November 10, 1992. On October 22, 1992, the PBGC moved to withdraw the reference to the district court for determination of these issues. The district court has not yet ruled on PBGC's motion for withdrawal of reference. The parties agreed to advance the hearing date to November 9, 1992, for this court's consideration of certain legal issues, prior to any determination of remaining factual issues. The Debtors, PBGC, the Committee and the Untied [sic] Steel Workers of America[4] argued their various positions at the November 9, 1992, hearing.

LEGAL ISSUES

The parties raise various preliminary legal issues related to the Claims and the priority that should be afforded to them. Based upon the memoranda and argument of the parties, and the independent research of the court, the court hereby determines the legal issues in the same order raised by the Debtors.

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[3] The Committee has participated fully is the issues in dispute here. The Committee's argument presented in its supporting memoranda generally tracks and supports the position of the Debtors. Where reference is made to the position of the Debtors, the court acknowledges that the Committee's position is similar.

[4] The United Steel Workers of America did not submit a legal memoranda briefing the various issues but appeared at the hearing on the oral argument in support of the Debtors' and the Committee's objection to the PBGC's Claims.

I. The Debtors assert the Claims are improperly inflated because (1) the Unfunded Benefit Claims duplicate the Minimum Contribution Claims, (2) the use of the concept of joint and several liability inflates the Claims, (3) the bankruptcy court, not the PBGC, should determine the appropriate discount rate to be used in calculating the Claims, and (4) interest should not be allowed on the Minimum Contribution Claims.

(1) Duplicate Claims

The Debtors argue that the PBGC is asserting a claim in its individual capacity, and also in its capacity as succesor trustee of the Master Plan, thus doubling the amount owed by the Debtors. PBGC asserts its claims for termination liability represent the total amount of unfunded benefit liabilities as of the termination date of all participants and beneficiaries under the plan. PBGC calculates the amount of unfunded benefit liabilties to be the excess of the present value of benefit liabilities over the current value of assets in the plan at termination. PBGC acknowledges that the amount of the Unfunded Benefit Claims are subject to reduction once the value to the plan of the Minimum Contribution Claims can be determined, but argues that the value of a claim to be collected in the future is not its face value.

The pleadings on file do not reflect the method PBGC used to calculate its Claims. If PBGC merely duplicated the Claims because it had assigned no present value to the Minimum Contribution Claims, the Claims are unsupported by fact and should be disallowed. If the PBGC has in fact discounted the Minimum Contribution Claims to present value, that fact and the amount of the present value discount has not been set forth in the pleadings. The inter-relatedness of the Claims has not been substantiated by any factual presentation. Until the amount of inter-relatedness is disclosed and supported by the

claimant, the duplicate portion which the Debtors assert is the entire amount of the Minimum Contribution Claim should be disallowed.

(2) Joint and Several Liability

The Debtors complain that the multiple Claims filed by PBGC under the theory of the joint and several liability of these Debtors improperly inflates the Unfunded Benefit Claims and the Minimum Contribution Claims. The Debtors argue that under ERISA, joint and several liability means that all assets of all members of a controlled group are available for recovery by PBGC on a single claim, not on multiple claims. The effect of the multiple claims, assert the Debtors, is to allow PBGC to receive the same percentage recovery as other creditors, multiplied by the number of Debtors in these cases. The Debtors would prefer that PBGC be allowed a single claim to be allocated among the Debtors based on equitable principles.

The Debtors rely on *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1090-92 (1st Cir. 1983), *cert. denied* 464 U.S. 961, 104 S.Ct. 393 (1983) as support for equitable allocation of joint and several termination liability. In that case, the circuit court reviewed the bankruptcy court's determination of net worth and allocation of liability between nondebtor solvent members of a controlled group and the creditors of two bankrupt insolvent wholly-owned subsidiaries. On remand, the bankruptcy court had found sufficient assets to satisfy the entire liability claim and also devised a method of allocation among the nondebtor solvent members of the control group. The issue of joint and several liability was not before either the bankruptcy court or the circuit court. The circuit court adopted the bankruptcy court's allocation of liability among the nondebtor solvent entities based on their relative net worth but remanded for a second time to resolve the liability between the solvent and insolvent identities. *Id.* at 1096. This case does not pro-

mote the Debtors' position regarding equitable allocation of joint and several liability in the present case.

PBGC responds that each member of its controlled group is jointly and severally liable under ERISA § 4062 (a), 29 U.S.C. § 1362(a), but that it acknowledges that it is limited to a single recovery. PBGC's position is consistent with the statute and with case law. *Tavery v. United States*, 897 F.2d 1032, 1034 (10th Cir. 1990). Congress' intent under the statute is quite clear. Each of the Debtors is to bear the full burden of the liability to PBGC, except to the extent that only one recovery may be obtained. It may well impact adversely on other creditors, but the principles of equal distribution to creditors are not so offended as to override the direct intent of Congress under ERISA.

(3) Discount Factor

ERISA § 4062(b)(1), 29 U.S.C. § 1362(b)(1), provides that termination liability under the statute is calculated from the termination date in accordance with regulations prescribed by the PBGC. Apparently, when an underfunded plan terminates, the PBGC is charged with determining the amount of unfunded guaranteed benefits under the plan. The PBGC is also charged with determining the present value of all future plan benefits when a plan is terminated, ERISA § 4001(a)(18), 29 U.S.C. § 1301(a)(18), and applies a range of discount rates for the purpose of determining termination liability, 29 C.F.R. pt. 2619 (valuation of Benefits in Nonmultiemployer Plans), dependent on when the plan will have to pay out benefits. *LTV Corp. v. Pension Benefit Guaranty Corp., (In Re Chateaugay Corp.)*, 115 B.R. 760, 767 (Bankr. S.D.N.Y. 1990). There is no evidence at this point in these cases relative to what assumptions are contained in the valuation regulations. PBGC asserts, however, that the appropriate rate to be used is only one of a myriad of factors used to determine the market value of PBGC's claim for unfunded benefit liabilities. Since the

court ruled, as set forth below, that these Claims arose pre-petition, the court must determine if the Claims, as drafted, are allowable pursuant to 11 U.S.C. § 502, or should be disallowed for any of the enumerated reasons set forth therein.

The Debtors argue that PBGC should not be allowed to apply its own, unilaterally-announced, discount rate in calculating the present value of the future benefits owed to retirees under the Master Plan. The Debtors' cite several cases dealing with the ability of the bankruptcy court to determine what discount rate should be applied to determine the value of a claim payable over time. *In re Hardzog*, 901 F.2d 858, 859-60 (10th Cir. 1990); *In re Loveridge Mach. & Tool Co.*, 36 B.R. 159, 165-70 (Bankr. D. Utah 1983). These cases, however, ordinarily refer to the ability of the court, once a claim has been established, to provide for the payment of that claim over time in such a manner as to fairly compensate the creditor for failing to receive the payment in cash at a specific time. In *LTV Corp.*, the bankruptcy court found, and the district court adopted, that PBGC advocates that it is entitled to promulgate and enforce, even in a bankruptcy case, regulations that violate fundamental bankruptcy provisions and principles that require fair and uniform distribution among creditors. *LTV Corp.*, 115 B.R. at 768.

In this case, no such evidence has yet been presented to the court. Absent such evidence at this preliminary stage, it would be inappropriate for this court to assume that PBGC calculations are *per se* violative of the basic precepts of the Bankruptcy Code. In light of the statutory scheme and the underlying goals supporting ERISA, this court shall afford due deference to the PBGC's determination of the amount of its claims and such determination shall have substantial weight in this court's ultimate determination under 11 U.S.C. § 502(b). Under § 502(b) of the Bankruptcy Code, this court retains its obligation to determine the amount of the PBGC's disputed claim

and such determination includes certain equitable considerations driving the over-riding policy goals advanced by the Bankruptcy Code. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946). This court will determine the amount of the PBGC claim upon presentation of further evidence indicating that some unfair and unreasonable advantage exists in favor of PBGC and against the creditors of the estate.

(4) Interest Accrual

PBGC asserts that it is entitled to interest on the Minimum Contribution Claims on the basis that such claims are post-petition taxes. PBGC offers no other basis for the allowance of interest. As set forth below, the Minimum Contribution Claims are not equivalent to post-petition taxes. Administrative expense claims are not entitled to interest. *In re John Clay and Company, Inc.*, 43 B.R. 797 (Bankr. D. Utah 1984). Unless these Debtors are solvent, unsecured creditors are not entitled to post-petition interest on their claims. *In re Kentucky Lumber Co.*, 860 F.2d 674, 676-79 (6th Cir. 1988).

II. The Debtors' assert the Claims are not entitled to priority under 11 U.S.C. § 507(a)(1) because (1) they arise from pre-petition services by CF&I's employees, (2) they should not be allowed as administrative claims under 11 U.S.C. § 503(b)(1)(A), and (3) the Claims should not be allowed as administrative tax claims under 11 U.S.C. § 503(b)(1)(B) because they are not tax claims, PBGC did not have a lien pre-petition and was prevented from acquiring one post-petition because of the automatic stay.

(1) Date Liability Arises

PBGC maintains that the post-petition termination of the Master Plan entitles the Unfunded Benefit Claims to post-petition administrative status pursuant to 11 U.S.C.

§ 503(b)(1)(B).[5] The Debtors assert that, because the Claims arose as a result of the pre-petition service of the plan participants, the Claims represent pre-petition debt. These issues were thoroughly reviewed in *LTV Corp. v. PBGC, (In re Chateaugay Corp.)*, 15 B.R. 760, 772-778 (Bankr. S.D.N.Y. 1990), applying the standard set forth in *In re Mammoth Mart, Inc.*, 536 F.2d 950, (1st Cir. 1976). In *LTV Corp.* the bankruptcy court found that PBGC's claim arose from pre-petition transactions because the triggering event was not the termination of the plans by the PBGC, but rather the pre-petition labor of LTV Corp.'s employees, *citing In re Johns-Manville Corp.*, 57 B.R. 680, 688 (Bankr. S.D.N.Y. 1986), and *In re Chateaugay Corp.*, 102 B.R. 335, 351 (Bankr. S.D.N.Y. 1989). The *LTV Corp.* court indicated that even a post-petition breach will be treated as giving rise to a pre-petition liability where the contract was executed pre-petition. *LTV Corp.*, 115 B.R. at 774, relying on *In re Chateaugay Corp.*, 87 B.R. 779, 796 (S.D.N.Y. 1988), *aff'd sub nom. PBGC v. LTV Corp.*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633, 110 S.Ct. 2688, 110 L.Ed.2d 579 (1990), and *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 118, 79 L.Ed.2d 482 (1984). PBGC relies on *Columbia Packing Co. v. Pension Benefit Guar. Corp.*, 81 B.R. 205 (D. Mass. 1981) in which the district court indicated "the past service liability cost is more properly viewed as an actuarial unit of measure for determining the employer's current periodic contribution than as compensation for work performed before the inception of the plan". *Columbia*, 81 B.R. at 209. The court then reasoned that both the normal cost and the past service liability cost of an employer's contribution "arise from" service rendered during the period in which the contribution accrues.

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[5] PBGC has not presented an argument that the Unfunded Benefit Claims were incurred to preserve the estate and as such should be afforded priority under 11 U.S.C. section 503(b)(1)(A).

The Debtors' view the issue as one of the claims arising when the underlying obligation to the employee was incurred. The PBGC asserts the claims arise when the employer's liability to the Master Plan for the unpaid minimum funding contribution was incurred, and that the liability at issue is not the Master Plan's liability to the participants, but the sponsor's liability to the Master Plan.

This court concludes that the better reasoning mandates that the point in time when the acts giving rise to the alleged liability were performed is the appropriate measure. *In re Johns-Manville Corp.*, 57 B.R. 680, 688 (Bankr. S.D.N.Y. 1986); *see also In re Amerex*, 853 F.2d 1526 (10th Cir. 1988; *In re Godwin Bevers Co.*, 575 F.2d 805, 807 (10th Cir. 1978). The termination of the Master Plan only substituted the PBGC as the successor in interest to the Master Plan's pre-petition claims. To rule otherwise would allow the PBGC to improperly advance its position as a result of its post-petition actions. *See e.g., Grady v. A.H. Robins Co.*, 839 F.2d 198, 202 (4th Cir. 1988) *cert. dismissed sub nom.; Joynes v. A.H. Robins Co.*, 487 U.S. 1260, 109 S.Ct. 201 (1988).

PBGC also asserts that reliance on *LTV Corp.* is inappropriate because the case did not include an analysis of I.R.C. § 412(n). The section of the I.R.S. Code that imposes a lien when there is a failure to make required contributions to ERISA-qualified plans was not considered in *LTV Corp.* because the plan at issue terminated before the effective date of the Pension Protection Act of 1987 (PPA). PBGC has not pointed to any provision of the PPA, however, that specifically establishes the date when a claim for funding contributions arises for purposes of 11 U.S.C. § 503. Therefore, except to the limited extent that the Minimum Contribution Claims are attributable to post-petition services rendered by the Debtors' active employees, the claims did not arise and were not incurred by the estate during the post-petition period.

(2) Actual and Necessary Expenses of Preserving Estate

PBGC argues that the Minimum Contribution Claims are actual and necessary expenses of preserving the Debtors' estates because maintaining the Master Plan post-petition benefits the Debtors' by furnishing an important fringe benefit for Debtors' workforce and fostering good employee relations. The Debtors' assert this is not the type of generalized "benefit" that gives rise to an administrative expense. *Kinnan & Kinnan Partnership v. Agristor Leasing*, 116 B.R. 162 (D.Neb.1990), *In re Neidig*, 117 B.R. 625 (Bankr.D.Colo.1990). In order for this argument to be pursuasive, the Debtors' would have had to induced the post-petition services to be performed. *In re New York Trap Rock Corp.*, 137 B.R. 568 (Bankr. S.D.N.Y.1992). To the contrary, the Debtors have attempted since filing to obtain termination of the Master Plan. Even though a generalized potential benefit may have been available to the Debtors by way of good employee relations, that it is not the type of specific benefit required in order to grant administrative status. *In re Mainstream Access, Inc.*, 134 B.R. 743, (Bankr. S.D.N.Y. 1991).

(3) Administrative Priority Under 11 U.S.C. § 503(b)(1)(B).

PBGC's assertion of administrative status under 11 U.S.C. § 503(b)(1)(B) also hinges upon the interpretation of I.R.C. § 412(n)(4)(C) and ERISA § 302(f)(4)(C), 29 U.S.C. § 1082(f)(4)(C). PBGC asserts these provisions specifically allow tax priority. The argument is that the Debtors' liability to the Master Plan was incurred as each due date for a funding contribution fell within the post-petition period. PBGC further argues that even if some liability was incurred pre-petition, it would still be entitled to priority because it is accorded tax status. Therefore, if PBGC'S Claims are not post-petition taxes,

they must be pre-petition taxes, entitled to priority under 11 U.S.C. § 507(a)(7).

The parties argue various interpretations of the relevancy of the lien language in the statues [sic]. PBGC argues that it is not the lien that is required for tax treatment, it is the *amount* subject to the lien that is to be treated as a tax. This analogy does not correctly assess the impact of the automatic stay, nor does it follow the plain meaning of the statute that the fixing of the lien is a precursor for treatment of the claims as a tax.

In these cases, the minimum funding payment became due on September 15, 1990, and a lien in the amount of the missed payment (in excess of $1,000,000) would have arisen under ERISA or I.R.C. § 412(n)(4)(B) on November 14, 1990, the sixtieth day after the missed payment was due. However, the Debtors filed their petitions on November 7, 1990, and the automatic stay provided by 11 U.S.C. § 362 was imposed. The imposition of the stay prevented the lien provided by I.R.C. § 412(n)(4)(B) from affixing to estate assets. PBGC argues that, because the lien arose by act of Congress and without the necessity of PBGC performing "any act" to impose the lien, 11 U.S.C. § 362 did not prevent the lien from attaching to the Debtors' property, and creating the basis for treatment as a tax. Assuming PBGC in fact took no affirmative action, that view was rejected in *In re Parr Meadows Racing Ass'n.*, 880 F.2d 1540, 1545 (2d Cir. 1989) *cert denied, 493 U.S. 1058 (1990). See In re Fuller, 134 B.R. 945, 947 (9th Cir. BAP 1992).* Tax treatment is only afforded to the amount with respect to which a lien *is* imposed, not to the amount to which the lien *may* be imposed. The issues is not one of lien priority or of secured status. The issue is whether a condition precedent exists that is a precursor to granting tax treatment. Therefore, if no lien was created because of the imposition of the automatic stay, no advancement to tax treatment is required or allowed.

PBGC argues that this reading of the statute is illogical because only liens affixing pre-petition would have such a preferred tax status; a status that would be redundant to the position of a secured claim that PBGC characterizes as superior to a tax claim. PBGC's position presumes that Congress envisioned no benefit to administrative tax status, as opposed to secured status. The court cannot accept this analsyis in light of the disparate treatment between secured claims and the treatment of taxes due and owing to the United States allowed under chapter 11.

PBGC asserts that a portion [6] of the Unfunded Benefit Claims are entitled to first priority under 11 U.S.C. §§ 503 (b)(1)(B) and 507(a)(1), pursuant to ERISA section 4068(c)(2), 29 U.S.C. § 1368(c)(2). The PBGC states that the majority of courts agree with this treatment.[7] The basis of this interpretation, however, rests on PBGC's reading of the language of the statute as set forth above. ERISA § 4068(a) provides that there shall be a lien in favor of the PBGC upon all property of the debtor in the amount of such liability not exceeding 30% of the debtor's collective net worth. The lien arises on the date of termination of a plan, and in a case under Title 11 of the United States Code, the lien imposed shall be treated in

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[6] In the range of $3,000,000 or 30 percent of the Debtors' estimated net worth. ERISA § 4068(a).

[7] Of the regularly reported cases cited by PBGC, none deal with the effect of post-petition plan termination. In *PBGC v. Ouimet Corp.*, 470 F. Supp. 945, 953 n.19 (D. Mass. 1979), *aff'd* 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), the issue was whether several business entities under common control could be held jointly and severally liable for the termination of an underfunded pension plan by two of their bankrupt affiliates. The subject business were adjudicated bankrupt on March 22, 1976, having previously shut down in March of 1975, and notified PBGC they would terminate their plans. The court correctly referenced the statutory scheme that PBGC's termination liability claims have priority over other creditors, and are to be treated in the same manner as a tax due. The court did not address whether that would be the case if there was no priority lien.

the same manner as a tax due and owing to the United States. Once again, however, in this case the termination of the plan occurred post-petition, and while the automatic stay was in effect. Since the automatic stay prevented the lien from arising, the lien cannot be treated as a tax.

III. The Debtors assert the Claims are not claims for taxes entitled to priority under 11 U.S.C. § 507 (a)(7).

PBGC alternatively argues that because I.R.C. § 412 (n)(4) accords its Claims tax status, if its Claims arose pre-petition it would be entitled to priority under 11 U.S.C. § 507(a)(7)(E). PBGC's assertion fails for the reasons set forth above. I.R.C. § 412(n)(4) accords tax status only for the amount with respect to which a lien is imposed. Because the automatic stay prevented the lien from being imposed, the condition for granting tax status did not occur.

IV. The Debtors assert the Minimum Contribution Claims are not entitled to priority under 11 U.S.C. § 507(a)(4).

The Debtors argue PBGC has improperly asserted that $8,164,995 of the Minimum Contribution Claims are entitled to priority because it has failed to consider the time and amount limitations imposed by 11 U.S.C. § 507(a)(4), that the priority is limited only to active employees actually working during the priority period, and that PBGC has failed to credit wage payments of $2,517,607 during the priority period. PBGC counters that contributions cannot be associated with the services of particular employes for particular periods, but must be a portion of the total projected cost of all plan benefits and expenses.

The PBGC's argument proves the Debtors' point. If the contributions cannot be associated with services rendered within 180 days of the date of filing, there is no

priority available. At this point in the dispute, the court has insufficient facts to make a determination that there were no employees that rendered services during the prescribed period. Resolution of that issue must await more detailed substantiation of PBGC's claim.

CONCLUSION

It is indeed unfortunate that after two years under the jurisdiction of the court, the major issues reduce themselves to resolution in this expedited manner, but such are the vagaries of reorganization practice. Based upon the foregoing determinations, it is hereby

ORDERED, PBGC's Unfunded Benefit Claims and Minimum Contribution Claims are disallowed to the extent they overlap and are duplicative of each other. The court is unable to determine the extent of potential duplication and the issue is reserved until further evidence can be presented;

ORDERED, that PBGC is allowed recovery on its Claims on a joint and several basis;

ORDERED, that the Debtors are hereby allowed to present evidence as to why there may be an equitable basis for the court to determine the present value of PBGC's Unfunded Benefit Claims, and, if the court so finds, to present evidence regarding the appropriate discount rate or other adjustments;

ORDERED, that PBGC's Claims are disallowed insofar as they include claims for post-petition interest;

ORDERED, that PBGC's Claims are disallowed any secured status;

ORDERED, that PBGC's Claims are disallowed any priority status except to the extent such Claims represent normal costs;

ORDERED, that PBGC's claims are disallowed any administrative status except to the extent such Claims represent normal costs;

DATED this 9 day of November, 1992.

/s/ Judith A. Boulden
JUDITH A. BOULDEN
United States Bankruptcy Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-4121

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

CF&I FABRICATORS OF UTAH, INC.; COLORADO & UTAH LAND COMPANY; KANSAS METALS COMPANY; ALBUQUERQUE METALS COMPANY; PUEBLO METALS COMPANY; DENVER METALS COMPANY; PUEBLO RAILROAD SERVICE COMPANY; CF&I FABRICATORS OF COLORADO, INC.; CF&I STEEL CORPORATION; COLORADO & WYOMING RAIL WAY COMPANY; UNSECURED CREDITORS COMMITTEE; UNITED STEEL WORKERS OF AMERICA AFL-CIO-CLC; WILLIAM J. WESTMARK, Trustee of the Colorado & Wyoming Railway Company,
Appellees.

No. 97-4122

IN RE: CF&I FABRICATORS OF UTAH, INC., *et al.*,
Reorganized Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

CF&I FABRICATORS OF UTAH, INC.; COLORADO & UTAH LAND COMPANY; KANSAS METALS COMPANY; ALBUQUERQUE METALS COMPANY; PUEBLO METALS COMPANY; DENVER METALS COMPANY; PUEBLO RAILROAD SERVICE COMPANY; CF&I FABRICATORS OF COLORADO, INC.; COLORADO & WYOMING RAIL WAY COMPANY,

Appellees.

Before PORFILIO, McKAY, and TACHA, Circuit Judges.

ORDER

Filed October 26, 1998

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in a regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER
Clerk of Court

by: /s/ Amy Frazer
Deputy Clerk

STATUTORY PROVISIONS

All citations are to the 1988 edition of United States Code

29 U.S.C. § 1082

§ 1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency

(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

(3) In any plan year in which a multiemployer plan is in reorganization, the accumulated funding deficiency of the plan shall be determined under section 1423 of this title.

(b) Funding standard account

(1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years,

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 5 plan years (15 plan years in the case of a multiemployer plan), and

(v) separately, with respect to each plan year, the net loss (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 10 plan years (30 plan years in the case of a multiemployer plan),

(C) the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal annual installments (until fully amortized) over a period of 5 plan years (15 plan years in the case of a multiemployer plan), and

(D) the amount necessary to amortize in equal annual installments (until fully amortized) over a

period of 5 plan years any amount credited to the funding standard account under paragraph (3)(D).

(3) For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years.

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 5 plan years (15 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 10 plan years (30 plan years in the case of a multiemployer plan).

(C) the amount of the waived funding deficiency (within the meaning of section 1083(c) of this title) for the plan year, and

(D) in the case of a plan year for which the accumulated funding deficiency is determined under the funding standard account if such plan year follows a plan year for which such deficiency was determined under the alternative minimum funding standard, the excess (if any) of any debit balance in the funding standard account (determined without regard to this subparagraph) over any debit balance in the alternative minimum funding standard account.

(4) Under regulations prescribed by the Secretary of the Treasury, amounts required to be amortized under paragraph (2) or paragraph (3), as the case may be—

(A) may be combined into one amount under such paragraph to be amortized over a period determined on the basis of the remaining amortization period for all items entering into such combined amount, and

(B) may be off set against amounts required to be amortized under the other such paragraph, with the resulting amount to be amortized over a period determined on the basis of the remaining amortization periods for all items entering into whichever of the two amounts being offset is the greater.

(5) INTEREST.—For purposes of determining a plan's current liability and for purposes of determining a plan's required contribution under section 412(*l*) of title 26 for any plan year—

(A) IN GENERAL.—The funding standard account (and items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

(B) REQUIRED CHANGE OF INTEREST RATE.—

(i) IN GENERAL.—If any rate of interest used under the plan to determine cost is not within the permissible range, the plan shall establish a new rate of interest within the permissible range.

(ii) PERMISSIBLE RANGE.—For purposes of this subparagraph—

(I) IN GENERAL.—Except as provided in subclass (II), the term "permissible range" means a rate of interest which is not more than 10 percent above, and not more than

10 percent below, the average rate of interest on 30-year Treasury securities during the 4-year period ending on the last day before the beginning of the plan year.

(II) SECRETARIAL AUTHORITY.—If the Secretary finds that the lowest rate of interest permissible under subclause (I) is unreasonably high, the Secretary may prescribe a lower rate of interest, except that such rate may not be less than 80 percent of the average rate determined under subclause (I).

(iii) ASSUMPTIONS.—Notwithstanding subsection (c)(3)(A)(i) of this section, for purposes of this section and for purposes of determining current liability, the interest rate used under the plan shall be—

(I) determined without taking into account the experience of the plan and reasonable expectations, but

(II) consistent with the assumptions which reflect the purchase rates which would be used by insurance companies to satisfy the liabilities under the plan.

(6) In the case of a plan which, immediately before September 26, 1980, was a multiemployer plan (within the meaning of section 1002(37) of this title as in effect immediately before such date)—

(A) Any amount described in paragraph (2)(B)(ii), (2)(B)(iii), or (3)(B)(i) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the amount arose;

(B) any amount described in paragraph (2)(B)(iv) or (3)(B)(ii) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 20 plan years, beginning with the plan year in which the amount arose;

(C) any change in past service liability which arises during the period of 3 plan years beginning on or after such date, and results from a plan amendment adopted before such date, shall be amortized in equal annualinstallments (until fully amortized) over 40 plan years, beginning with the plan year in which the change arises; and

(D) any change in past service liability which arises during the period of 2 plan years beginning on or after such date, and results from the changing of a group of participants from one benefit level to another benefit level under a schedule of plan benefits which—

(i) was adopted before such date and

(ii) was effective for any plan participant before the beginning of the first plan year beginning on or after such date,

shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the increase arises.

(7) For purposes of this part—

(A) Any amount received by a multiemployer plan in payment of all or part of an employer's withdrawal liability under part 1 of subtitle E of subchapter III of this chapter shall be considered an amount contributed by the employer to or under the plan. The Secretary of the Treasury may prescribe by regulation additional charges and credits to a multiemployer plan's funding standard account to

the extent necessary to prevent withdrawal liability payments from being unduly reflected as advance funding for plan liabilities.

(B) If a plan is not in reorganization in the plan year but was in reorganization in the immediately preceding plan year, any balance in the funding standard account at the close of such immediately preceding plan year—

(i) shall be eliminated by an offsetting credit or charge (as the case may be), but

(ii) shall be taken into account in subsequent plan years by being amortized in equal annual installments (until fully amortized) over 30 plan years.

The preceding sentence shall not apply to the extent of any accumulated funding deficiency under section 418B(a) of title 26 as of the end of the last plan year that the plan was in reorganization.

(C) Any amount paid by a plan during a plan year to the Pension Benefit Guaranty Corporation pursuant to section 1402 of this title or to a fund exempt under section 501(c)(22) of title 26 pursuant to section 1403 of this title shall reduce the amount of contributions considered received by the plan for the plan year.

(D) Any amount paid by an employer pending a final determination of the employer's withdrawal liability under part 1 of subtitle E of subchapter III of this chapter and subsequently refunded to the employer by the plan shall be charged to the funding standard account by the Secretary.

(E) For purposes of the full funding limitation under subsection (c)(7) of this section, unless otherwise provided by the plan, the accrued liability under a multiemployer plan shall not include beenfits which

are not nonforfeitable under the plan after the termination of the plan (taking into consideration section 411(d)(3) of title 26).

(c) Methods

(1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

(B) For purposes of this part, the value of a bond or other evidence of indebtedness which is not in default as to principal or interest may, at the election of the plan administrator, be determined on an amortized basis running from initial cost at purchase to par value at maturity or earliest call date. Any election under this subparagraph shall be made at such time and in such manner as the Secretary of the Treasury shall by regulations provide, shall apply to all such evidences of indebtedness, and may be revoked only with the consent of the Secretary of the Treasury. In the case of a plan other than a multiemployer plan, this subparagraph shall not apply, but the Secretary of the Treasury may by regulations provide that the value of any dedicated bond portfolio of such plan shall be determined by using the interest rate under subsection (b)(5) of this section.

(3) For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods—

(A) in the case of—

(i) a plan other than a multiemployer plan, each of which is reasonable (taking into ac-

count the experience of the plan and reasonable expectations) or which, in the aggregate, result in a total contribution equivalent to that which would be determined if each such assumption and method were reasonable, o [sic]

(ii) a multemployer plan, which, in the aggregate, are reasonable (taking into account the experiences of the plan and reasonable expectations), and

(B) which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

(4) For purposes of this section, if—

(A) a change in benefits under the Social Security Act [42 U.S.C. 301 et seq.] or in other retirement benefits created under Federal or State law, or

(B) a change in the definition of the term "wages" under section 3121 of title 26, or a change in the amount of such wages taken into account under regulations prescribed for purposes of section 401 (a)(5) of title 26,

results in an increase or decrease in accrued liability under a plan, such increase or decrease shall be treated as an experience loss or gain.

(5) If the funding method for a plan is changed, the new funding method shall become the funding method used to determine costs and liabilities under the plan only if the change is approved by the Secretary of the Treasury. If the plan year for a plan is changed, the new plan year shall become the plan year for the plan only if the change is approved by the Secretary of the Treasury.

(6) If, as of the close of a plan year, a plan would (without regard to this paragraph) have an accumulated funding deficiency (determined without regard to the

alternative minimum funding standard account permitted under subsection (g) of this section) in excess of the full funding limitation—

(A) the funding standard account shall be credited with the amount of such excess, and

(B) all amounts described in paragraphs (2), (B), (C), and (D) and (3)(B) of subsection (b) of this section which are required to be amortized shall be considered fully amortized for purposes of such paragraphs.

(7) FULL-FUNDING LIMITATION.—

(A) IN GENERAL.—For purposes of paragraph (6), the term "full-funding imitation" means the excess (if any) of—

(i) the lesser of (I) 150 percent of current liability, or (II) the accrued liability (including normal cost) under the plan (determined under the entry age normal funding method if such accrued liability cannot be directly calculated under the funding method used for the plan), over

(ii) the lesser of—

(I) the fair market value of the plan's assets, or

(II) the value of such assets determined under paragraph (2).

(B) CURRENT LIABILITY.—For purposes of subparagraphs (A) and (D), the term "current liability" has the meaning given such term by subsection (d)(7) of this section (without regard to subparagraph (D) thereof).

(C) SPECIAL RULE FOR PARAGRAPH (6)(B).—For purposes of paragraph (6)(B), subparagraph

(A)(i) shall be applied without regard to subclause (I) thereof.

(D) REGULATORY AUTHORITY.—The Secretary of the Treasury may by regulations provide—

(i) for adjustments to the percentage contained in subparagraph (A)(i) to take into account the respective ages or lengths of service of the participants,

(ii) alternative methods based on factors other than current liability for the determination of the amount taken into account under subparagraph (A)(i), and

(iii) for the treatment under this section of contributions which would be required to be made under the plan but for the provisions of subparagraph (A)(i)(I).

(8) For purposes of this part, any amendment applying to a plan year which—

(A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,

shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan adminitrator files a notice with the Sec-

retary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 1083(b) of this title) and that waiver under section 1083(a) of this title is unavailable or inadequate.

(9) For purposes of this part, a determination of experience gains and losses and a valuation of the plan's liability shall be made not less frequently than once every 3 years, except that such determination shall be made more frequently to the extent required in particular cases under regulations prescribed by the Secretary of the Treasury.

10) For purposes of this section—

(A) In the case of a plan other than a multiemployer plan, any contributions for a plan year made by an employer during the period—

(i) beginning on the day after the last day of such plan year, and

(ii) ending on the date which is 8½ months after the close of the plan year,

shall be deemed to have been made on such last day.

(B) In the case of a multiemployer plan, any contributions for a plan year made by an employer after the last day of such plan year, but not later than two and one-half months after such day, shall be deemd to have been made on such last day. For purposes of this subparagraph, such two and one-half month period may be extended for not more than six months under regulations prescribed by the Secretary of the Treasury.

(11) LIABILITY FOR CONTRIBUTIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the amount of any contribution required by this section and any required installments under subsection (e) of this section shall be paid by the employer responsible for contributing to or under the plan the amount described in subsection (b)(3)(A) of this section.

(B) JOINT AND SEVERAL LIABILITY WHERE EMPLOYER MEMBER OF CONTROLLED GROUP.—

(i) IN GENERAL.—In the case of a plan other than a multiemployer plan, if the employer referred to in subparagraph (A) is a member of a controlled group, each member of such group shall be jointly and severally liable for payment of such contribution or required installment.

(ii) CONTROLLED GROUP.—For purposes of clause (i), the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of title 26.

(d) Additional funding requirements for plans which are not multiemployer plans

(1) In general

In a case of a defined benefit plan (other than a multiemployer plan) which has an unfunded current liability for any plan year, the amount charged to the funding standard account for such plan year shall be increased by the sum of—

(A) the excess (if any) of—

(i) the deficit reduction contribution determined under paragraph (2) for such plan year, over

(ii) the sum of the charges for such plan year under subparagraphs (B) (other than clauses (iv) and (v) thereof), (C), and (D) of subsection (b)(2) of this section, reduced by the sum of the credits for such plan year under subparagraph (B)(i) of subsection (b)(3) of this section, plus

(B) the unpredictable contingent event amount (if any) for such plan year.

Such increase shall not exceed the amount necessary to increase the funded current liability pecentage to 100 percent.

(2) Deficit reduction contribution

For purposes of paragraph (1), the deficit reduction contribution determined under this paragraph for any plan year is the sum of—

(A) the unfunded old liability amount, plus

(B) the unfunded new liability amount.

(3) Unfunded old liability amount

For purposes of this subsection—

(A) In general

The unfunded old liability amount with respect to any plan for any plan year is the amount necesssary to amortize the unfunded old liability under the plan in equal annual installments over a period of 18 plan years (beginning with the 1st plan year beginning after December 31, 1988).

(B) Unfunded old liability

The term "unfunded old liability" means the unfunded current liability of the plan as of the beginning of the 1st plan year beginning after December 31, 1987 (determined without regard to any

plan amendment increasing liabilities adopted after October 16, 1987).

(C) Special rules for benefit increases under existing collective bargaining agreements

(i) In general

In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and the employer ratified before October 29, 1987, the unfunded old liability amount with respect to such plan for any plan year shall be increased by the amount necessary to amortize the unfunded existing benefit increase liability in equal annual installments over a period of 18 plan years beginning with—

(I) the plan year in which the benefit increase with respect to such liability occurs, or

(II) if the taxper elects, the 1st plan year beginning after December 31, 1988.

(ii) Unfunded existing benefit increase liabilities

For purposes of clause (i), the unfunded existing benefit increase liability means, with respect to any benefit increase under the agreements described in clause (i) which takes effect during or after the 1st plan year beginning after December 31, 1987, the unfunded current liability determined—

(I) by taking into account only liabilities attributable to such benefit increase, and

(II) by reducing the amount determined under paragraph (8)(A)(ii) by the current liability determined without regard to such benefit increase.

(iii) Extensions, modifications, etc. not taken into account

For purposes of this subparagraph, any extension, amendment, or other modification of an agreement after October 28, 1987, shall not be taken into account.

(4) Unfunded new liability amount

For purposes of this subsection—

(A) In general

The unfunded new liability amount with respect to any plan for any plan year is the applicable percentage of the unfunded new liability.

(B) Unfunded new liability

The term "unfunded new liability" means the unfunded current liability of the plan for the plan year determined without regard to—

(i) the unamortized portion of the unfunded old liability, and

(ii) the liability with respect to any unpredictable contingent event benefits (without regard to whether the event has occurred).

(C) Applicable percentage

The term "applicable percentage" means, with respect to any plan year, 30 percent, reduced by the product of—

(i) .25 multplied by

(ii) the number of percentage points (if any) by which the funded current liability percentage exceeds 35 percent.

(5) Unpredictable contingent event amount

(A) In general

The unpredictable contingent event amount with respect to a plan for any plan year is an amount equal to the greater of—

(i) the applicable percentage of the product of—

(I) 100 percent, reduced (but not below zero) by the funded current liability percentage for the plan year, multiplied by

(II) the amount of unpredictable contingent event benefits paid during the plan year, including (except as provided by the Secretary of the Treasury) any payment for the purchase of an annuity contract for a participant or beneficiary with respect to such benefits, or

(ii) the amount which would be determined for the plan year if the unpredictable contingent event benefit liabilities were amortized in equal annual installments over 7 plan years (beginning with the plan year in which such event occurs).

(B) Applicable percentage

In the case of plan years beginnings in:	The applicable percentage is:
1989 and 1990	5
1991	10
1992	15
1993	20
1994	30
1995	40
1996	50
1997	60
1998	70
1999	80
2000	90
2001 and thereafter	100.

(C) Paragraph not to apply to existing benefits

This paragraph shall not apply to unpredictable contingent event benefits (and liabilities attributable

thereto) for which the event occurred before October 17, 1987.

(D) Special rule for first year of amortization

Unless the employer elects otherwise, the amount determined under subparagraph (A) for the plan year in which the event occurs shall be equal to 150 percent of the amount determined under subparagraph (A)(i). The amount under subparagraph (A)(ii) for subsequent plan years in the amortization period shall be adjusted in the manner provided by the Secretary of the Treasury to reflect the application of this subparagraph.

(6) Special rules for small plans

(A) Plans with 100 or fewer participants

This subsection shall not apply to any plan for any plan year if on each day during the preceding plan year such plan had not more than 100 participants.

(B) Plans with more than 100 but not more than 150 participants

In the case of a plan to which subparagraph (A) does not apply and which on each day during the preceding plan year had no more than 150 participants, the amount of the increase under paragraph (1) for such plan year shall be equal to the product of—

(i) such increase determined without regard to this subparagraph, multiplied by

(ii) 2 percent for the highest number of participants in excess of 100 on any such day.

(C) Aggregation of plans

For purposes of this paragraph, all defined benefit plans maintained by the same employer (or any member of such employer's controlled group) shall

be treated as 1 plan, but only employees of such employer or member shall be taken into account.

(7) Current liability

For purposes of this subsection—

(A) In general

The term "current liability" means all liabilities to participants and their beneficiaries under the plan.

(B) Treatment of unpredictable contingent event benefits

(i) In general

For purposes of subparagraph (A), any unpredictable contingent event benefit shall not be taken into account until the event on which the benefit is contingent occurs.

(ii) Unpredictable contingent event benefit

The term "unpredictable contingent event benefit" means any benefit contingent on an event other than—

(I) age, service, compensation, death, or disability, or

(II) an event which is reasonably and reliably predictable (as determined by the Secretary of the Treasury).

(C) Interest rates used

The rate of interest used to determine current liability shall be the rate of interest used under subsection (b)(5) of this section.

(D) Certain service disregarded

(i) In general

In the case of a participant to whom this subparagraph applies, only the applicable percent-

age of the years of service before such individual became a participant shall be taken into account in computing the current liability of the plan.

(ii) Applicable percentage

For purposes of this subparagraph, the applicable percentage shall be determined as follows:

If the years of participation are:	The applicable percentage is:
1	20
2	40
3	60
4	80
5 or more	100.

(iii) Participants to whom subparagraph applies

This subparagraph shall apply to any participant who, at the time of becoming a participant—

(I) has not accrued any other benefit under any defined benefit plan (whether or not terminated) maintained by the employer or a member of the same controlled group of which the employer is a member, and

(II) who first becomes a participant under the plan in a plan year beginning after December 31, 1987.

(8) Other definitions

For purposes of this subsection—

(A) Unfunded current liability

The term "unfunded current liability" means, with respect to any plan year, the excess (if any) of—

(i) the current liability under the plan, over

(ii) value of the plan's assets determined under subsection (c)(2) of this section reduced by any credit balance in the funding standard account.

(B) Funded current liability percentage

The term "funded current liability percentage" means, with respect to any plan year, the percentage which—

(i) the amount determined under subparagraph (A)(i), is of

(ii) the current liability under the plan.

(C) Controlled group

The term "controlled group" means any group treated as a single employer under subsections (b), (c), (m), and (*o*) of section 414 of title 26.

(D) Adjustments to prevent omissions and duplications

The Secretary of the Treasury shall provide such adjustments in the unfunded old liability amount, the unfunded new liability amount, the unpredictable contingent event amount, the current payment amount, and any other charges or credits under this section as are necessary to avoid duplication or omission of any factors in the determination of such amounts, charges, or credits.

(e) Quarterly contributions required

(1) In general

If a plan (other than a multiemployer plan) fails to pay the full amount of a required installment for any plan year, then the rate of interest charged to the funding standard account under subsection (b)(5) of this section with respect to the amount of the underpayment for the period of the underpayment shall be equal to the greater of—

(A) 175 percent of the Federal mid-term rate (as in effect under section 1274 of title 26 for the 1st month of such plan year), or

(B) the rate under subsection (b)(5) of this section.

(2) Amount of underpayment, period of underpayment

For purposes of paragraph (1)—

(A) Amount

The amount of the underpayment shall be the excess of—

(i) the required installment, over

(ii) the amount of (if any) of the installment contributed to or under the plan on or before the due date for the installment.

(B) Period of underpayment

The period for which any interest is charged under this subsection with respect to any portion of the underpayment shall run from the due date for the installment to the date on which such portion is contributed to or under the plan (determined without regard to subsection (c)(10) of this section).

(C) Order of crediting contributions

For purposes of subparagraph (A)(ii), contributions shall be credited against unpaid required installments in the order in which such installments are required to be paid.

(3) Number of required installments; due dates

For purposes of this subsection—

(A) Payable in 4 installments

There shall be 4 required installments for each plan year.

(B) Time for payment of installments

In the case of the following required installments:	The due date is:
1st	April 15
2nd	July 15
3rd	October 15
4th	January 15 of the following year.

(4) Amount of required installment

For purposes of this subsection—

(A) In general

The amount of any required installment shall be the applicable percentage of the required annual payment.

(B) Required annual payment

For purposes of subparagraph (A), the term "required annual payment" means the lesser of—

(i) 90 percent of the amount required to be contributed to or under the plan by the employer for the plan year under section 412 of title 26 (without regard to any waiver under subsection (c) thereof, or

(ii) 100 percent of the amount so required for the preceding plan year.

Clause (ii) shall not apply if the preceding plan year was not a year of 12 months.

(C) Applicable percentage

For purposes of subparagraph (A), the applicable percentage shall be determined in accordance with the following table:

For plan years beginning in:	The applicable percentage is:
1989	6.25
1990	12.5
1991	18.75
1992 and thereafter	25.

(D) Special rules for unpredictable contingent event benefits

In the case of a plan with any unpredictable contingent event benefit liabilities—

(i) such liabilities shall not be taken into account in computing the required annual payment under subparagraph (B), and

(ii) each required installment shall be increased by the greater of—

(I) the amount of benefits described in subsection (d)(5)(A)(i) of this section paid during the 3-month period proceeding the month in which the due date for such installment occurs, or

(II) 25 percent of the amount determined under subsection (d)(5)(A)(ii) of this section for the plan year.

(5) Fiscal years and short years

(A) Fiscal years

In applying this subsection to a plan year beginning on any date other than January 1, there shall be substituted for the months specified in this subsection, the months which correspond thereto.

(B) Short plan year

This section shall be applied to plan years of less than 12 months in accordance with regulations prescribed by the Secretary of the Treasury.

(f) Imposition of lien where failure to make required contributions

(1) In general

In the case of a plan to which this section applies, if—

(A) Any person fails to make a required installment under subsection (e) of this section or any other payment required under this section before the due date for such installment or other payment, and

(B) the unpaid balance of such installment or other payment (including interest), when added to the aggregate unpaid balance of all preceding such installments or other payments for which payment was not made before the due date (including interest), exceeds $1,000,000,

then there shall be a lien in favor of the plan in the amount determined under paragraph (3) upon all property and rights to property, whether real or personal, belonging to such person and any other person who is a member of the same controlled group of which such person is a member.

(2) Plans to which subsection applies

This subsection shall apply to a defined benefit plan (other than a multiemployer plan) for any plan year for which the funded current liability percentage (within the meaning of subsection (d)(8)(B) of this section) of such plan is less than 100 percent.

(3) Amount of lien

For purposes of paragraph (1), the amount of the lien shall be equal to the lesser of—

(A) the amount by which the unpaid balances described in paragraph (1)(B) (including interest) exceed $1,000,000, or

(B) the aggregate unpaid balance of required installments and other payments required under this section (including interest)—

(i) for plan years beginning after 1987, and

(ii) for which payment has not been made before the due date.

(4) Notice of failure; lien

(A) Notice of failure

A person committing a failure described in paragraph (1) shall notify the Pension Benefit Guaranty Corporation of such failure within 10 days of the due date for the required installment or other payment.

(B) Period of lien

The lien imposed by paragraph (1) shall arise on the 60th day following the due date for the required installment or other payment and shall continue until the last day of the first plan year in which the plan ceases to be described in paragraph (1)(B). Such lien shall continue to run without regard to whether such plan continues to be described in paragraph (2) during the period referred to in the preceding sentence.

(C) Certain rules to apply

Any amount with respect to which a lien is imposed under paragraph (1) shall be treated as taxes due and owing the United States and rules similar to the rules of subsections (c), (d), and (e) of section 1368 of this title shall apply with respect to a lien imposed by subsection (a) of this section and the amount with respect to such lien.

(5) Enforcement

Any lien created under paragraph (1) may be perfected and enforced only by the Pension Benefit Guaranty Corporation, or at the direction of the Pension Benefit Guaranty Corporation, by the contributing sponsor (or any member of the controlled group of the contributing sponsor).

(6) Definitions

For purposes of this subsection—

(A) Due date; required installment

The terms "due date" and "required installment" have the meanings given such terms by subsection (e) of this section, except that in the case of a payment other than a required installment, the due date shall be the date such payment is required to be made under this section.

(B) Controlled group

The term "controlled group" means any group treated as a single employer under subsections (b), (c), (m), and (*o*) of section 414 of title 26.

(g) Cross reference

For alternative amortization method for certain multiemployer plans see section 1013(d) of this Act.

29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendemnt of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by

the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement

or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1301

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

(1) "administrator" means the person or persons described in paragraph (16) of section 1002 of this title;

(2) "substantial employer", for any plan year of a single-employer plan, means one or more persons—

(A) who are contributing sponsors of the plan in such plan year,

(B) who, at any time during such plan year, are members of the same controlled group, and

(C) whose required contributions to the plan for each plan year constituting one of—

(i) the two immediately preceding plan years, or

(ii) the first two of the three immediately preceding plan years,

total an amount greater than or equal to 10 percent of all contributions required to be paid to or under the plan for such plan year;

(3) "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph—

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of title 26 as in effect immediately before such date;

(4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 1302 of this title;

(5) "fund" means the appropriate fund established under section 1305 of this title;

(6) "basic benefits" means benefits guaranteed under section 1322 of this title (other than under section 1322(c) of this title), or under section 1322a of this title (other than under section 1322a (g) of this title);

(7) "non-basic benefits" means benefits guaranteed under section 1322(c) of this title or 1322a (g) of this title;

(8) "nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or title 26;

(9) "reorganization index" means the amount determined under section 1421(b) of this title;

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has no joint board of trustees, the plan administrator;

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury;

(12) "outstanding claim for withdrawal liability" means a plan's claim for the unpaid balance of the liability determined under part 1 of subtitle E of this subchapter for which demand has been made, valued in accordance with regulations prescribed by the corporation;

(13) "contributing sponsor", of a single-employer plan, means a person—

(A) who is responsible, in connection with such plan, for meeting the funding requirements under section 1082 of this title or section 412 of title 26, or

(B) who is a member of the controlled group of a person described in subparagraph (A), has been responsible for meeting such funding requirements, and has employed a significant number (as may be defined in regulations of the corporation) of participants under such plan while such person was so responsible;

(14) in the case of a single-employer plan—

(A) "controlled group" means, in connection with any person, a group consisting of such person and all other persons under common control with such person; and

(B) the determination of whether two or more persons are under "common control" shall be made under regulations of the corporation which are consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under subsections (b) and (c) of section 414 of title 26;

(15) "single-employer plan" means any defined benefit plan (as defined in section 1002(35) of this title) which is not a multiemployer plan;

(16) "benefit liabilities" means the benefits of employees and their beneficiaries under the plan (within the meaning of section 401(a)(2) of title 26);

(17) "amount of unfunded guaranteed benefits", of a participant or beneficiary as of any date under a single-employer plan, means an amount equal to the excess of—

(A) the actuarial present value (determined as of such date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title) of the benefits of the participant or beneficiary under the plan which are guaranteed under section 1322 of this title, over

(B) the current value (as of such date) of the assets of the plan which are required to be allocated to those benefits under section 1344 of this title;

(18) "amount of unfunded benefit liabilities" means, as of any date, the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title), over

(B) the current value (as of such date) of the assets of the plan;

(19) "outstanding amount of benefit liabilities" means, with respect to any plan, the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of the termination date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title), over

(B) the value of the benefit liabilities which would be so determined by only taking into account benefits which are guaranteed under section 1322 of this title or to which assets of the plan are allocated under section 1344 of this title;

(20) "person" has the meaning set forth in section 1002(9) of this title;

(21) "affected party" means, with respect to a plan—

(A) each participant in the plan,

(B) each beneficiary under the plan who is a beneficiary of a deceased participant or who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title),

(C) each employee organization representing participants in the plan, and

(D) the corporation,

except that, in connection with any notice required to be provided to the affected party, if an affected party has designated, in writing, a person to receive such notice on behalf of the affected party, any reference to the affected party shall be construed to refer to such person.

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be

treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of title 26.

(2) For purposes of subtitle E of this subchapter—

(A) except as otherwise provided in subtitle E of this subchapter, contribtuions or other payments shall be considered made under a plan for a plan year if they are made within the period prescribed under section 412(c)(10) of title 26 (determined, in the case of a terminated plan, as if the plan had continued beyond the termination date), and

(B) the term "Secretary of the Treasury" means the Secretary of the Treasury or such Secretary's delegate.

29 U.S.C. § 1362

§ 1362. Liabilty for termination of single-employer plans under a distress termination or a termination by corporation

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of—

(1) liability to the corporation, to the extent provided in subsection (b) of this section,

(2) liability to the trust established pursuant to section 1341(c)(3)(B)(ii) or (iii) of this title or section 1342(i) of this title, to the extent provided in subsection (c) of this section, and

(3) liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (d) of this section.

(b) Liability to corporation

(1) Amount of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation.

(B) Special rule in case of subsequent insufficiency

For purposes of subparagraph (A), in any case described in section 1341(c)(3)(C)(ii) of this title, actuarial present values shall be determined as of the date of the notice to the corporation (or the finding by the corporation) described in such section.

(2) Payment of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation under this subsection shall be due and payabe to the corporation as of the termination date, in cash or securities acceptable to the corporation.

(B) Special rule

Payment of the liability under paragraph (1)(A)(ii) shall be made under commercially reasonable terms prescribed by the corporation. The parties involved shall make a reasonable effort to reach agreement on such commercially reasonable terms. Any such terms prescribed by the corporation shall provide for deferral of 50 percent of any amount of liability otherwise payable for any year under this subparagraph if a person subject to such liability demonstrates to the satisfaction of the corporation that no person subject to such liability has any individual pre-tax profits for such person's fiscal year ending during such year.

(3) Alternative arrangements

The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

(c) Liability to section 1342 trustee

A person described in subsection (a) of this section shall be subject to liability under this subsection to the trustee appointed under subsection (b) or (c) of section 1342 of this title. The liability of such person under this subsection shall consist of—

(1) the outstanding balance of the accumulated funding deficiencies (within the meaning of section 1082(a)(2) of this title and section 412(a) of title 26) of the plan (if any) (which, for purposes of this subparagraph, shall incude the amount of any increase in such accumulated funding deficiencies of the plan which would result if all pending applications for waivers of the minimum funding standard under section 1083 of this title or section 412(d) of title 26 and for extensions of the amortization pe-

riod under section 1084 of this title or section 412(e) of title 26 with respect to such plan were denied and if no additional contributions (other than those already made by the termination date) were made for the plan year in which the termination date occurs or for any previous plan year).

(2) the outstanding balance of the amount of waived funding deficiencies of the plan waived before such date under section 1083 of this title or section 412(d) of title 26 (if any), and

(3) the outstanding balance of the amount of decreases in the minimum funding standard allowed before such date under section 1084 of this title or section 412(e) of title 26 (in any),

together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation. The liability under this subsection shall be due and payable to such trustee as of the termination date, in cash or securities acceptable to such trustee.

(d) Definitions

(1) Collective net worth of persons subject to liability

(A) In general

The collective net worth of persons subject to liability in connection with a plan termination consists of the sum of the individual net worths of all persons who—

(i) have individual net worths which are greater than zero, and

(ii) are (as of the termination date) contributing sponsors of the terminated plan or members of their controlled groups.

(B) Determination of net worth

For purposes of this paragraph, the net worth of a person is—

(i) determined on whatever basis best reflects, in the determination of the corporation, the current status of the person's operations and prospects at the time chosen for determining the net worth of the person, and

(ii) increased by the amount of any transfers of assets made by the person which are determined by the corporation to be improper under the circumstances, incuding any such transfers which would be inappropriate under title 11 if the person were a debtor in a case under chapter 7 of such title.

(C) Timing of determination

For purposes of this paragraph, determinations of net worth shall be made as of a day chosen by the corporation (during the 120-day period ending with the termination date) and shall be computed without regard to any liability under this section.

(2) Pre-tax profits

The term "pre-tax profits" means—

(A) except as provided in subparagraph (B), for any fiscal year of any person, such person's consolidated net income (excluding any extraordinary charges to income and including any extraordinary credits to income) for such fiscal year, as shown on audited financial statements prepared in accordance with generally accepted accounting principles, or

(B) for any fiscal year of an organization described in section 501(c) of title 26, the excess of income over expenses (as such terms are de-

fined for such organizations under generally accepted accounting principles),

before provision for or deduction of Federal or other income tax, any contribution to any single-employer plan of which such person is a contributing sponsor at any time during the period beginning on the termination date and ending with the end of such fiscal year, and any amounts required to be paid for such fiscal year under this section. The corporation may by regulation require such information to be filed on such forms as may be necessary to determine the existence and amount of such pre-tax profits.

(3) Liability payment years

The liability payment years in connection with a terminated plan consist of the consecutive one-year periods following the last plan year preceding the termination date, excluding the first such year in any case in which the first such year ends less than 180 days after the termination date.

11 U.S.C. § 502

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purposes of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanidng subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a),

(b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(7) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

11 U.S.C. § 503

§ 503. Allowance of administrative expenses

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

17 U.S.C. § 507

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay—

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b)(1) of this title, against a debtor who owns or operates a

grain storage facility, as defined in section 557 (b)(2) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $2,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withhed and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceeding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous

refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C. § 1114

§ 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree bnefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hear-

ing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may

agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(*l*) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

11 U.S.C. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims

or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing as to the several classes of securites possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative

of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PENSION BENEFIT GUARANTY CORP.,

Petitioner,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*

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QUESTIONS PRESENTED

I. Whether the courts below correctly ruled that the bankruptcy claims of the Pension Benefit Guaranty Corporation ("PBGC") are pre-petition claims in bankruptcy, and therefore are not entitled to administrative priority in bankruptcy under 11 U.S.C. § 503(b) because the consideration for such claims was the pre-petition labor of the pension plan participants, and thus administrative priority does not apply.

II. Whether the courts below correctly ruled that in determining the amount of claims for future pension benefits "as of the date of the filing of the petition," under 11 U.S.C. § 502(b), they are not required to accept PBGC's present-value calculation, using different present-value assumptions developed for use solely under ERISA, without regard to bankruptcy law.

RULE 14.1(b) STATEMENT OF PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, with the following correction:

On November 7, 1990, the petition date of the underlying bankruptcy cases, CF&I Steel Corporation was publicly held and owned all of the stock of its nine subsidiaries: CF&I Fabricators of Utah, Inc., Colorado & Utah Land Company, Kansas Metals Company, Albuquerque Metals Company, Pueblo Metals Company, Denver Metals Company, Pueblo Railroad Service Company, CF&I Fabricators of Colorado, Inc., and Colorado and Wyoming Railway Company. These entities were the "Debtors" in the proceedings below.

On March 3, 1993, the effective date of the confirmed Chapter 11 plan in these cases, all stockholder interests were canceled, including the interests of CF&I Steel Corporation as sole stockholder of the other debtors. On and after March 3, 1993, the Debtors have been referred to as the "Reorganized Debtors." The Reorganized Debtors are now ten separate corporate shells without shareholders, elected officers, or directors. Each Reorganized Debtor is managed by Scott C. King, a representative of creditors under governance provisions approved by the Bankruptcy Court. Under the asset purchase agreement approved with the Chapter 11 plan, some of the names of the Reorganized Debtors were changed. The Reorganized Debtors' current names are: Reorganized CF&I Fabricators of Utah, Inc., Colorado & Utah Land Company, Kansas Metals Company, Albuquerque Metals Company, Reorganized Pueblo Metals Company, Denver Metals Company, Reorganized Pueblo

Railroad Service Company, Reorganized CF&I Fabricators of Colorado, Inc., Reorganized CF&I Steel Corporation, and The Reorganized Colorado & Wyoming Railway Company.

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STATUTES INVOLVED

The statutes involved are 11 U.S.C. §§ 502, 503, 507, 1113, 1114, 1123, and 29 U.S.C. §§ 1082, 1144, 1301, 1362.[2]

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1. This brief will use the following abbreviations in its citation of documents: "Pet." = Petition for a Writ of Certiorari; "Pet. App." = Appendix to Petition for a Writ of Certiorari; "Resp. App." = Appendix to Respondents Reorganized CF&I Fabricators of Utah, Inc., *et al.*, Brief in Opposition.

2. Citations to the United States Code are to the 1994 Edition, except that, if an earlier edition contained a different provision applicable in this case, the earlier edition's provision will be identified. Citations to the Code of Federal Regulations are to the 1998 Edition of Title XL, except that, if an earlier edition contained a different provision pertinent to this case, the earlier edition's provision will be identified.

STATEMENT OF THE CASE

A. Reorganized Debtors' Statement of the Case

The Reorganized Debtors are ten bankrupt corporations liquidating their assets for the benefit of creditors under a confirmed bankruptcy plan of reorganization (the "Plan of Reorganization") pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. PBGC is one of the largest unsecured creditors. Under the Plan of Reorganization, proceeds of the liquidation have been and will be distributed to creditors under the direction of a representative of creditors appointed by the Bankruptcy Court. Because the Reorganized Debtors are deeply insolvent, general unsecured creditors, who suffered hundreds of millions of dollars in actual pecuniary losses, will receive less than ten percent of their claims. Stockholders interests were abolished, and shareholders will receive nothing.

The Reorganized Debtors' predecessors, CF&I Steel Corporation ("CF&I") and its former subsidiaries (collectively, the "Debtors"), operated a steel plant and related businesses. CF&I sponsored two qualified pension plans for the Debtors' employees and retirees (the "Pension Plans") and was required by ERISA to meet minimum funding standards. Because of large losses in its steel business and a general decline in the steel industry, CF&I did not have sufficient revenues to pay its 1989 minimum funding payment of approximately $12.4 million which came due on September 15, 1990, resulting in the Debtors filing petitions under Chapter 11 of the Bankruptcy Code on November 7, 1990 (the "Petition Date"). Before and after the Petition Date, CF&I asked PBGC to terminate the larger of the Pension Plans (the "Master Plan"). PBGC denied CF&I's request until March 19, 1992, when PBGC terminated the Master Plan.

Only PBGC has power unilaterally to terminate pension plans. 29 U.S.C. § 1342(a) (ERISA § 4042(a)). Under 29 U.S.C. § 1341(a)(3) (ERISA § 4041(a)(3)), the Debtors could not unilaterally terminate the Master Plan because the Bankruptcy Code (11 U.S.C. § 1113(f)) prohibited the Debtors from any unilateral termination or alteration of its collective bargaining agreement with the United Steelworkers of America AFL-CIO-CLC ("USWA"), which required maintenance of the Pension Plans.

Because funding payments for retirees' pensions earned before the Petition Date are prepetition debts, the Debtors by law could not pay them after filing bankruptcy, 11 U.S.C. § 362, except under a confirmed plan of reorganization. *PBGC v. LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990). Therefore, after the Petition Date, the Debtors could not correct the 1989 funding deficiencies or make any further prepetition pension funding payments except under a confirmed plan of reorganization. Debtors continued to pay prepetition retiree *health* benefits after the Petition Date required by the Bankruptcy Code. 11 U.S.C. § 1114(e). PBGC incorrectly implies that Debtors did something wrong by obeying these requirements of bankruptcy law. Pet. 6-7.

PBGC filed two substantially identical claims against each of the Debtors as to the terminated Master Plan. First, PBGC claimed $64,874,511 for alleged unpaid contributions to the Master Plan ("Minimum Contribution Claims") on many theories of priority, all but one of which, administrative priority under 11 U.S.C. § 503(b)(1)(A), PBGC has abandoned. Second, PBGC asserted a priority claim of $263,200,000 for an alleged insufficiency in assets of the Master Plan to pay pensions ("Unfunded Benefits Claim"). Pet. App. 4a, 82a.

PBGC now asserts no priority for its Unfunded Benefits Claim after it was denied below but asserts a general unsecured claim. Pet. App. 4a-5a, 48a-49a.

PBGC was granted an administrative claim for the postpetition "normal cost" component of its pension claims (that portion attributable to postpetition services of employees). Pet. App. 12a n.5. PBGC was also granted a prepetition priority claim under 11 U.S.C. § 507(a)(4) (limited unsecured prepetition claims for contributions to employee benefit plans) for a portion of its claim that is not in dispute here. PBGC's allowed administrative and priority claims (approximately $2 million) were paid in full, pursuant to the confirmed Chapter 11 plan. Under the Plan of Reorganization PBGC received a valuable partnership interest in the new owner of the steel plant and will receive other distributions on par with other unsecured creditors.

PBGC scoldingly asserts that "as a result of Respondents' failure to fund their Pension Plan and the agency's obligation to pay guaranteed benefits, PBGC sustained a loss of nearly a quarter billion dollars." Pet. 3.

What really occurred, however, is this: (i) as a result of Debtors' inability (not "failure") to have enough cash to contribute to the Master Plan, the Debtors filed for relief under Chapter 11; (ii) as a result of the Chapter 11 filing, Debtors could not contribute to the Master Plan; (iii) as a result of the inability (not "failure") of Debtors to fund the Master Plan, PBGC after a long delay terminated the Master Plan; and (iv) as a result of PBGC's statutory mission (not Debtors' "failure"), PBGC has paid guaranteed pension benefits in accordance with law. That is PBGC's statutory duty. Before PBGC may validly claim "losses," PBGC must deduct its premium, investment,

and other income, including PBGC's recoveries in this case, the same as any insurer would do.

PBGC operates on private, not government, funds — premiums from plan sponsors and assets from terminated plans. PBGC Br. 6. Guaranteed pension benefits are not paid from collection of taxes or out of general federal revenues. Pet. 4.

Among the remaining creditors is a trust to provide medical benefits to the retirees of the defunct companies, and the PBGC. Priority payments, or increased payments, to the PBGC will reduce, therefore, the amounts to be received by the other creditors, including the same retirees who are recipients of guaranteed and non-guaranteed pension benefits from the PBGC, whom that agency is statutorily empowered to protect. In that sense, PBGC is in a conflict with the members of its own protected class.

B. Identification, Under Rule 15.2, of PBGC's Mis-Statements of the Case

In some respects, PBGC's "Statement of the Case" (Pet. 2) is less than accurate and far from fair. [3] PBGC's Statement

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3. PBGC's opening assertion that "PBGC sustained a loss of nearly a quarter billion dollars" seeks to expand the magnitude of the agency's stake in the issues presented *here* far beyond the adjudicated reality. PBGC's failure to sustain its bloated original set of claims was the result of losing issues for which it has not sought further review. PBGC had asserted a claim for a "lien" arising upon termination of the CF&I pension plan, and the courts below denied that claim because the automatic stay nullified the purported lien. Pet. App. 48a-49a, 94a-95a. PBGC's Statement of the Case continues to describe a "lien" for delinquent contributions (Pet. 4), although the courts below barred that lien claim because the date of its purported occurrence — 60 days after the amount of the delinquency exceeded $1 million — was postpetition and therefore barred by the automatic stay, 11 U.S.C. § 362. Pet. App. 5a-9a, 44a-46a, 95a.

of the Case includes a lengthy outside-the-record description of how the agency's plan termination insurance program is operated (Pet. 3-6), including selected references to portions of one statute (ERISA, the Employee Retirement Income Security Act of 1974), without reference to the Bankruptcy Code, the primary statute governing this case.

The notion that PBGC has "sustained a loss of nearly a quarter billion dollars" (Pet. 3) ignores the fact that PBGC, like every insurer, is in the business of paying insured benefits, and that the insurer's payment of benefits does not cause a "loss" in the long run if the benefits are offset by premium and other income in the long run. In fact, PBGC's latest annual report, issued only last month, shows a very handsome net income of $1.531 billion in its single-employer insurance program, and total return on investments of 14.4%, with investment income exceeding actuarial charges.[4] PBGC's Statement of the Case also seeks to balance its financial exposure in this case against a stipulated limitation on PBGC's recovery from the "Appeal Funds" set aside in CF&I confirmed plan of reorganization (Pet. 7). That limitation, however, is not evidence that only PBGC has a stake in the outcome here. On the contrary, the "Appeal Funds" were stipulated as part of the negotiated plan of reorganization (Pet. App. 4a) precisely because PBGC's legal position — a position for which PBGC seeks to establish a precedent here — would have given the PBGC the right to overwhelm the claims of all other unsecured creditors.

In its "Statement of the Case," PBGC insists that Congress expressly gave the agency the right to set its own discount rate (Pet. 5-6) for both ERISA and bankruptcy cases (Pet. 14). The statement is incorrect on the law; but right or wrong, the

4. PBGC 1998 Ann. Rep. 23, Resp. App. 15a-17a.

particulars of this case are peculiarly inappropriate for current review. The previous agency regulations relied upon by the PBGC (and lodged with the Court by them) have been superseded and re-superseded. Only a year after their issuance PBGC modified them for the express reason that the interest rate used in those old regulations and relied upon by PBGC at that time was out-of-line with annuity market rates. 58 Fed. Reg. 50,812 (1993) (to be codified at 29 C.F.R. pts. 2619 and 2676) (discussed under Point II, *infra*).

PBGC states that rulings below are an "inducement for solvent companies to enter bankruptcy." (Pet. 15). The argument is simply at odds with the factual evidence in the case, including the facts that

> CF&I met its funding obligations until a decline in economic conditions of the American steel industry left it unable to make minimum funding contributions of approximately $14 million. This state of affairs led CF&I into filing a Petition for Relief under chapter 11 of the Bankruptcy Code.

(Pet. App. 3a). The adjudicated facts of this case are controlling here, and among those facts is the finding that CF&I was not a solvent company when it filed Chapter 11, and was in bankruptcy precisely because it was financially unable (not unwilling) to make further contributions to its pension plan.

On the discount rate issue, PBGC asserts that the court of appeals' decision "means that the agency's regulation no longer serves as a uniform benchmark of a plan's benefit liabilities in all circumstances." (Pet. 16). The notion that PBGC's wish for a "uniform benchmark" should override the bankruptcy court's statutory duty to treat all unsecured creditors equally by applying a uniform discount rate for creditors of a particular debtor is an apples-and-oranges distortion, injecting a non-

germane agency bookkeeping concern into the statutory duty of a bankruptcy court under 11 U.S.C. § 502(b) to "determine the amount of such claim . . . as of the date of the filing of the petition" — that is, to provide equal treatment among creditors of a specific debtor.[5]

The PBGC clearly knows how to lobby for its objectives legislatively, having legislatively enhanced its position in 1986 and 1987.[6] Indeed, PBGC has tried to accomplish an advancement of its priorities in bankruptcy legislatively, but

5. Pet. App. 22a. To illustrate, assume Creditor A is entitled to a future stream of payments of $1 million per year for ten years, and Creditor B is entitled to $10 million on the petition date. If Creditor A's claim were discounted using an artificially low discount rate, Creditor A would receive a substantial amount of unmatured interest. Assuming a market discount rate of 12.3% and that the rate sought by Creditor A were 6.5%, the net present value ("NPV") of Creditor A's ten-year payment stream would be as follows:

NPV @ 12.3% rate = $5,581,507 NPV @ 6.5% rate = $7,188,830

If the net present value amount using the 12.3% market rate ($5,581,507) were invested in the market and earned 12.3% interest, the future value of that present value amount would be $10,000,000. If the net present value amount using the 6.5% rate ($7,188,830) earned the market rate of 12.3% interest, the future value of this present value amount would be $12,879,730. By the end of ten years, Creditor A would have received nearly $2.9 million in investment earnings in addition to its ten $1 million payments. Distributions to Creditors A and B would not be equal due to the deflated rate used to value Creditor A's claim. To treat both creditors equitably, Creditor A's claim must be discounted to present value using a discount rate which reflects the future earning power of Creditor A's claims distribution.

6. Single-Employer Pension Plan Amendments Act of 1986, Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, (Cont'd)

failed.[7] PBGC's unsuccessful quest for legislation granting the priorities it asks this Court to create for it is noted in Giddens, "Attempting to Protect Employee Retirement Income Within Bankruptcy Reorganization: PBGC Efforts to Obtain Priority Status," 1993 Ann. Rev. Banking L. 397, 423-24 (1993); Dennis R. Dow and Mark Moedritzer, *ERISA-Related Claims in Bankruptcy*, 3 J. BANKR. L. & PRAC. 76, 94 (1993); and *In re Kent Plastics Corp.*, 183 B.R. 841, 845-46 (Bankr. S.D. Ind. 1995).

PBGC's purported purpose in urging its unrealistic discount rate ("uniform benchmark") obscures, moreover, the agency's real purpose in setting that rate. This admitted purpose is to act as a deterrent to an employer who might be tempted to voluntarily foist pension liabilities upon the agency, even though the employer could well afford to fund them. That "institutional goal" was a factual finding of the district court, based on admissions of the PBGC,[8] but it is not the purpose or provision of the Bankruptcy Code.

(Cont'd)
Pub. L. No. 99-272, 100 Stat. 82 (1986); Pension Protection Act of 1987, included in the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987). Despite PBGC efforts, neither bill advanced PBGC's claims in bankruptcy.

7. See S. 1730, 99th Cong. § 996, at 578-79 (as reported, October 2, 1985), which would have amended ERISA Title IV to give PBGC a tax priority for a "lien" under Title IV and provided that "[t]he lien and perfection of the lien shall be treated as fixing a statutory lien that is not avoidable under section 545 of title 11, United States Code." After this and other priority language of S. 1730 was incorporated in the Consolidated Omnibus Budget Reconciliation Act, the final language of that bill (H.R. 3128, 99th Cong. (1986)) gave no such priority. See H.R. Conf. Rep. No. 99-453, at 576 (1985).

8. Pet. App. 36a: "PBGC's own institutional goal of making plan terminations less attractive than the purchase of close-out annuities."

REASONS FOR DENYING THE WRIT

There are no compelling reasons to grant certiorari, and there are strong reasons not to do so. This bankruptcy case involves no constitutional question, no conflict with this Court's decisions, no conflict among the circuits, no dissenting opinion below, and not even a single judge wishing to hear reconsideration en banc. The Tenth Circuit ruling is consistent with those in other circuits. The particular PBGC valuation methodology which the PBGC seeks tc inject into valuation proceedings of the bankruptcy court is in fact a methodology which the PBGC has already abandoned because of its acknowledged "disparity between the PBGC's low interest rates and familiar private sector rates." 58 Fed. Reg. 50,812 (September 28, 1993). And the Tenth Circuit's rulings rejecting administrative priority and insisting on use of the court's own present-value claims evaluation are plainly consistent with the provisions of the Bankruptcy Code governing Chapter 11 proceedings.

I.

THERE IS NO COMPELLING REASON TO GRANT THE WRIT: THE TENTH CIRCUIT'S DECISION PRESENTS NO CONSTITUTIONAL CONFLICT, NO CONFLICT WITH ANY DECISION OF THIS COURT, NO CONFLICT AMONG THE CIRCUITS, NO DISSENT BELOW, AND IS CONSISTENT WITH THE DECISIONS IN OTHER CIRCUITS

While PBGC argues that there are important issues raised in this bankruptcy case, this is not an appropriate case in which to address them, and there are no "compelling reasons" warranting the grant of certiorari. Sup. Ct. R. 10.

The petition cites no conflict among the courts of appeals (Sup. Ct. R. 10(a)). PBGC'S Petition acknowledges the consistent rulings in three cases that have considered the discount rate issue. Pet. 14 n.10.[9] Likewise, on the claim of PBGC's administrative priority in bankruptcy, the petition claims no conflict in circuits, and acknowledges consistent rulings in the circuits that have considered the question. (Pet. 27).

There was not even a dissent in the Court of Appeals for the Tenth Circuit, and on motion for reconsideration not a single judge of the Court of Appeals supported reconsideration en banc. Indeed, the only time the PBGC ever persuaded even a dissenting judge on either of these issues was in *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 822 (6th Cir. 1997) (dissenting opinion), but on a motion for reconsideration in that case, once again not a single other judge of that Court of Appeals supported reconsideration en banc. *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 1997 U.S. App. LEXIS 37157 (6th Cir. Dec. 8, 1997). And PBGC did not petition for certiorari in that case.

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9. Citing *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R. 690, 695-96 (S.D.N.Y. 1991), and 126 B.R. 165 (Bankr. S.D.N.Y. 1991), *vacated by consent order*, 17 Empl. Ben. Cas. (BNA) 1102 (S.D.N.Y. 1993); *Belfance v. PBGC (In re CSC Industries, Inc.)*, No. 95-4103 (Bankr. N.D. Ohio Dec. 3, 1997), *appeal docketed*, No. 4:99CV00041 (N.D. Ohio, Jan 8, 1999).

II.

THE PBGC REGULATIONS AT ISSUE HERE HAVE BEEN SUPERSEDED, AND RE-SUPERSEDED AND PRESENT ONLY AN OBSOLETE CONTEXT FOR CONSIDERATION OF THE VALUATION ISSUE

The obsolete regulatory context in which this case arises makes it particularly inappropriate for further review by certiorari. The 1992 version of PBGC's valuation regulation, which PBGC lodged with the Court, was supplanted a year later. While PBGC insists that the 1993 amended regulation was "without change to its basic approach" (Pet. 6 n.5), in fact the preamble to the 1993 regulations conceded that a reason for the change was the prior regulation's "disparity between the PBGC's low interest rates and familiar private sector rates." 58 Fed. Reg. 50,812 (September 28, 1993), Resp. App. 20a.[10] The 1993 superseding regulation claims to adhere to PBGC's stated commitment to "accurately reflect private sector group *annuity prices*" (*Id.* 20a) (emphasis added), but concedes that it in fact involved a "disparity between PBGC's low *interest rates* and familiar private sector *rates*." (*Id.*). Doubtless PBGC has an adequate explanation to support its notion that "for most plans, this amendment will not significantly affect the valuations produced" (Resp. App. 18a), and in any event the private sector *insurance rates* urged by PBGC are not market rates of interest at all, in the bankruptcy sense. Be that as it may, the context in which the interest rate issue is presented by PBGC's petition in this case is simply the wrong context for certiorari. The specific regulation which the PBGC asks this Court to impose upon a bankruptcy court's market

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10. The 1993 regulation was re-superseded, in turn, by the current regulation, which was promulgated in 1996. 29 C.F.R. § 4044.52, 61 Fed. Reg. 34002 (1996).

valuation under 11 U.S.C. § 502(b), is not merely obsolete, it was admittedly wrong. It presents, therefore, the wrong context in which to test the currently-effective PBGC valuation regulation. This context does not invoke a "compelling reason" for the grant of certiorari.

III.

THE REMAINING ISSUES IN THIS CASE LACK THE CONTEXT NECESSARY TO EVALUATE THE IMPACT ON THE "AGENCY'S ABILITY TO CARRY OUT ITS MISSION"

PBGC argues that its petition should now be granted because "immediate review of these issues is important to the agency's ability to carry out its mission." Pet. 19. PBGC carries out its mission, however, by filing a much wider array of claims in each bankruptcy. That is what PBGC did in this case. PBGC litigated all those claims in the Bankruptcy Court and District Court. It dropped some of them in the Court of Appeals (although the major issue it dropped was in fact tenaciously argued at the same time in another case),[11] and it has dropped more issues in its petition here. Pet. 10 n.7. Thus, the case presented here does not give the Court an adequate or accurate picture of the PBGC's ongoing litigation posture in seeking "to carry out its mission."

PBGC insists that "the 'world of bankruptcy' — to which the court of appeals ostensibly limited its holding — is the main world in which the PBGC insurance fund operates." Petit. 14. That argument is both immaterial and wrong. The statute, of course, was designed in 1974 and originally provided that a

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11. *PBGC v. Skeen (In re Bayly Corp.)*, 163 F.3d 1205 (10th Cir. 1998).

plan termination required no bankruptcy, nor even economic distress. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4041(a), 88 Stat. 829, 1020 (1974). While later amendments injected, and current law includes, voluntary termination requirements of economic "distress," ERISA § 4041, 29 U.S.C. § 1341, not all of those requirements include proceedings in Bankruptcy. ERISA § 4041(c)(2)(B)(iii), 29 U.S.C. § 1341(c)(2)(B)(ii).

Even more to the point, *this* case does not involve a voluntary plan termination. On the contrary, this was an involuntary plan termination, initiated by the PBGC under ERISA § 4042, 29 U.S.C. § 1342. Involuntary terminations may be initiated at any time the PBGC believes that its financial exposure would "increase unreasonably." Indeed, PBGC's legal strategy is the use of its "early warning system," in which PBGC learns of an impending corporate transaction (spin-off, sale of assets, etc.), and induces the economically healthy plan sponsor to make an extra contribution to the sponsor's pension plan by threatening the sponsor with an involuntary plan termination under ERISA § 4042, leading to a lien for the full amount of unfunded liabilities — outside of any bankruptcy and therefore immune from any stay or other restriction of the Bankruptcy Code. The 1998 Annual Report of PBGC, under the heading "Loss Prevention," describes this system as being "PBGC's principal performance measure for its strategic goal of protecting existing defined benefit plans and their participants . . ." PBGC 1998 Ann. Rep. 14, Resp. App. 14a. Clearly, the PBGC's non-bankruptcy enforcement rights are not only alive and well, but also the central component of PBGC's overall corporate strategy.

IV.

THE TENTH CIRCUIT CORRECTLY DENIED ADMINISTRATIVE PRIORITY

The Tenth Circuit's refusal to grant administrative priority was for unfunded benefit liabilities of the Master Plan correct.

A. Claims for Unfunded Pension Liabilities or for Contributions to Fund Such Pension Benefits are Prepetition Debts Because the Pensions Were Earned by Prepetition Service

All of PBGC's remaining claims arise from pension benefits earned under the Master Plan by work performed before CF&I filed its bankruptcy petition.

PBGC's allowed postpetition administrative claim, for minor amounts of pension benefits earned by postpetition labor, has already been paid in full pursuant to the confirmed Chapter 11 plan of reorganization.

PBGC also claimed and was granted a prepetition priority claim under 11 U.S.C. § 507(a)(4) (limited unsecured prepetition claims for contributions to employee benefit plans) for a portion of its claim that is not in dispute here. That claim was paid pursuant to the confirmed plan of reorganization. That claim, however, clearly demonstrates that the Bankruptcy Code itself treats pensions, and pension funding obligations, as prepetition debts if the work that earned the pensions was done prepetition. Section 507(a)(4) of the Bankruptcy Code grants this priority to "unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of the filing of the petition. . . ." The Bankruptcy Code's specific treatment of plan benefits as

"arising from services rendered . . . before the date of the filing of the petition" is definitive of the prepetition character of the funding claim.

PBGC's remaining claims are not attributable to postpetition services of the Debtors' employees. Their character as prepetition claims is based on undisputed facts found by the lower courts. Pet. App. 89a-91a.

When PBGC chose to terminate unilaterally the Master Plan and become the successor trustee, it succeeded to the Master Plan's prepetition claims against the Debtors. The mere postpetition change of the trustee of the Master Plan from CF&I to PBGC (or the postpetition transfer of the Master Plan's prepetition claims to PBGC) does not convert prepetition claims into post-petition claims any more than does a postpetition change in management of a creditor or the postpetition assignment of a prepetition claim.

The great weight of authority holds that liabilities are not "incurred" postpetition simply because they become due post-petition. *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 816-819 (6th Cir. 1997) (rejecting PBGC's attempts to obtain postpetition status for prepetition claims); *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986); *Coldwell Banker & Co. v. Godwin Bevers Co. (In re Godwin Bevers Co.)*, 575 F.2d 805, 807 (10th Cir. 1978) (prepetition commission agreement did not give rise to administrative claim under Bankruptcy Act when property was sold postpetition); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976) ("a claimant who fully performs under a contract prior to the filing of the petition will not be entitled to first priority even though his services

may have resulted in a direct benefit to the bankrupt estate after the filing"); *Gallivan v. Springfield Post Road Corp.*, 110 F.3d 848 (1st Cir. 1997) (same result under Bankruptcy Code, applying *Mammoth Mart* analysis); *In re Great N.E. Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (appropriate focus for determining when a claim arises is "the time when the acts giving rise to the alleged liability were performed").

As Judge Lifland correctly analyzed this issue in the landmark *LTV* cases:

> The PBGC's right to payment upon termination was, on the petition date, a classic prepetition contingent claim. The postpetition termination of the pension plans did not transform the PBGC's contingent pre-petition claims into post-petition claims.

LTV Corp. v. PBGC (In re Chateaugay Corp.), 115 B.R. 760, 775 (Bankr. S.D.N.Y. 1990),[12] reiterated in *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882 (Bankr. S.D.N.Y. 1993). The district court in *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R.

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12. On June 7, 1993, some of the *LTV* decisions were vacated by consent of the parties, including *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 115 B.R. 760 (Bankr. S.D.N.Y. 1990), *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 126 B.R. 165 (Bankr. S.D.N.Y. 1991), and *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R. 690 (S.D.N.Y. 1991). Vacatur does not deprive these decisions of their persuasive value and this Court is free to adopt their highly persuasive reasoning. *See In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993).

690, 697 (S.D.N.Y. 1991), agreed: "PBGC's claims are pre-petition contingent claims because the labor giving rise to the pension obligations was performed pre-petition."

In treating PBGC's claims as prepetition claims, the Tenth Circuit was squarely in line with the foregoing well established precedent.

B. *Reading Co. v. Brown* Does Not Require a Different Result

The keystone of PBGC's argument for first priority is the Petition's reliance on *Reading Co. v. Brown*, 391 U.S. 471 (1968). Pet. 26. *Reading*, however, involved a debt that was *incurred postpetition*. As the Petition itself recites, "the Court granted administrative priority to a postpetition tort claim" because the claimant's "property was damaged by a fire through the negligence of the receiver." In each of the later cases following *Reading*, cited by PBGC (Pet. 26-27),[13] the debtor's conduct which gave rise to the claim occurred

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13. *Cumberland Farms Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 20-21 (1st Cir. 1997) (postpetition operation of underground storage tanks without satisfying financial responsibility requirements); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1453-58 (11th Cir. 1992) (postpetition environmental violations); *United States v. LTV Corp., (In re Chateauguay Corp.)*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (response costs of postpetition maintenance of hazardous waste sites); *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123-24 (6th Cir. 1987) (response costs as to hazardous wastes still on Debtor's land postpetition); *Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200, 203 (1st Cir. 1985) (postpetition continuation of nuisance); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983) (back pay order against Trustee in bankruptcy who violated NLRA postpetition).

postpetition. In CF&I's case, the pension debt was incurred by the prepetition labor of CF&I's employees. *Reading* and its progeny are not in point.

PBGC is even farther off the mark when the petition (Pet. 28) argues that "[t]he employer's statutory obligation to pay contributions to the plan is entirely separate from the plan's obligation to participants," citing *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 762 (1999). The Court's *Hughes* ruling had nothing to do with bankruptcy, and had nothing to do with the question whether the obligation to fund was a postpetition or prepetition debt. *Hughes*, a fiduciary duty case under ERISA title I, simply held that the use of excess, overfunding, assets to benefit other participants did not violate ERISA's fiduciary standards.

V.

THE TENTH CIRCUIT CORRECTLY APPROVED THE BANKRUPTCY COURT'S MARKET VALUATION METHOD AS REQUIRED BY 11 U.S.C. § 502(b), RATHER THAN PBGC'S REGULATORY DISCOUNT RATE

The Tenth Circuit correctly upheld the bankruptcy court's decision on the discount rate applicable to bringing future pension payment obligations to present value.

The issue presented by the Petition is whether PBGC's original Unfunded Benefits Claim used the proper valuation method *in bankruptcy*. The parties do not dispute PBGC's calculation of the aggregate *future value* of its Unfunded Benefits Claim. The dispute lies in the methodology by which the *present value* of PBGC's claim should be determined.

The courts below properly ruled that PBGC's Unfunded Benefits Claim should be reduced to present value using a market-based discount rate of 12.3%, which fairly reflects the expected rate of return a prudent investor may achieve on the investment of a sum of money set aside as of the Petition Date to satisfy future benefit payments, and "is the only rate in evidence compatible with the Bankruptcy Code." Pet. App. 23a.

PBGC, on the other hand, asserts based on ERISA that it has the unilateral prerogative to establish the discount rate for its own claim and to impose that rate upon the bankruptcy court, to the detriment of other unsecured creditors. PBGC contends that its claim should be discounted utilizing a single-creditor-specific discount rate of 6.5% embodied in its own regulation, Pet. App. 21a. That is a rate PBGC devised to suit its own administrative convenience and to promote PBGC's own "institutional goal of making plan termination less attractive," Pet. App. 22a. Applying the ERISA discount factor to value PBGC's bankruptcy claim, however, would undermine the fundamental bankruptcy principle of equality of distribution among similarly situated creditors. 11 U.S.C. § 502(b)(2).

The courts below properly recognized the applicability of the fundamental bankruptcy principle of equality of treatment between similarly situated creditors to bankruptcy claims allowance. Pet. App. 13a-14a. Adherence to the principle of equal treatment is more essential where the claim to be valued is a claim for a future stream of payments. The Bankruptcy Code mandates that claims for future payments be discounted to present value. 11 U.S.C. § 502(b) ("the court . . . shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition . . ."). The regulatory interest rate assumption proffered by the PBGC

applies to the present-valuing of future benefits under a different statute (ERISA), in a different context, and for a different purpose (to discourage plan terminations).[14]

As the *LTV* bankruptcy court recognized, "based on its charter, the PBGC is clearly motivated to enhance its claims . . . as much as possible." *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 115 B.R. 760, 771 (Bankr. S.D.N.Y. 1990). Under the Bankruptcy Code, the court, not the creditor, is charged with the responsibility to determine the present value of a claim for a future stream of payments. *Id.* at 765-71. Allowing PBGC to dictate an artificially low discount rate would enable PBGC to inflate the value of its own claim. Creditors, however, are not granted that privilege. PBGC's discount factor is fundamentally inconsistent with 11 U.S.C. §§ 502(b), 502(b)(2), 1123(a)(4) and the equitable bankruptcy principles inherent in those statutory provisions.

PBGC's position rests entirely upon its unsupportable contention that the Bankruptcy Code must be subordinated to PBGC's non-bankruptcy regulation. PBGC attempts to justify its untenable position by arguing that its regulation is entitled to absolute deference as "legislative rules," and that the non-bankruptcy law embodied in its regulation is the only law to be applied in determining the validity and amount of its Unfunded Benefits Claim. Pet. 21-22. PBGC relies heavily on its analysis of *Batterton v. Francis*, 432 U.S. 416 (1977), *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and related cases. PBGC tries to show that its valuation regulation carries the force of law and thereby prevails over inconsistent provisions of the Bankruptcy Code.

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14. 29 C.F.R. § 2619.1 at 666 (7-1-92 Edition) (from Material Lodged in Support of Petition for Certiorari, at 1).

PBGC's reliance on *Batterton* and *Chevron* is misplaced. Moreover, even assuming *arguendo* that PBGC's 1992 regulation has the force and effect of law, its status as a legislative rule does not justify subordination of the Bankruptcy Code.

In *Batterton* and *Chevron*, the Supreme Court addressed the degree of deference to be accorded an administrative agency in the context of reviewing the agency's construction of the statute it administers. *Batterton*, 432 U.S. at 424; *Chevron*, 467 U.S. at 842. In that context, the Court ruled that where Congress has expressly authorized the agency to elucidate a specific provision of the statute by regulation, the agency's construction is to be given "controlling weight" unless it is arbitrary, capricious, or manifestly contrary to law. *Chevron*, 467 U.S. at 844 (citing *Batterton*, 432 U.S. at 425). In reaching its decision, the Court recognized that an agency's construction of the statute *it administers* is an area in which it has special expertise, and because of that expertise, the agency is entitled to substantial deference.

The Court's rulings in *Batterton* and *Chevron* do not apply in the instant case, and the Court of Appeals correctly saw it that way. Pet. App. 14a-15a. This case does not present an issue concerning an administrative agency's construction of the statute which *it administers*.[15] PBGC administers ERISA, not the Bankruptcy Code. The Reorganized Debtors do not challenge the discount factor set forth in the 1992 PBGC

---

15. Valuation of PBGC's claims requires the Bankruptcy Court to "reconcil[e] conflicting policies" between ERISA and the Bankruptcy Code, a task which PBGC is not at all authorized, or equipped, to perform. *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 115 B.R. 760, 768-71 (Bankr. S.D.N.Y. 1990); *cf. Chevron*, 467 U.S. at 844.

regulation as an improper construction of ERISA. The issue in this case is whether PBGC's discount factor should be applied, outside of ERISA, to value a claim in bankruptcy at present value.

Any delegation of legislative authority arguably expressed in 29 U.S.C. § 1301(a)(18) (ERISA § 4001(a)(18)) does not extend to the valuation of claims in bankruptcy. Section 1301(a)(18) defines the amount of unfunded benefit liabilities "for purposes of this title [ERISA]" only. Nothing in § 1301(a)(18), or any other provision of ERISA, expresses any congressional intent to authorize PBGC to determine the present value of unfunded future benefit liabilities for purposes of the Bankruptcy Code. Rather, Congress expressly delegated exclusive responsibility for valuation of all claims in bankruptcy, whatever their source, to the Bankruptcy Court in § 502(b).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

11 U.S.C. § 1113

Sec. 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)

> (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall —
>
> > (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that —

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

Appendix A

(d)

(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized

representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1114

Sec. 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of

providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)

(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections *1102* and 1103 of this title for the purpose of carrying out the purposes of sections *1114* and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)

(1) A labor organization shall be, for purposes of this section, the authorized representative of those

persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

Appendix A

(e)

(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that —

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments, after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section *1129* of this title is effective has the status of an allowed administrative expense as provided in section *503* of this title.

Appendix A

(f)

(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall —

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

Appendix A

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that —

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities; except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): Provided, however, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): Provided

further, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)

(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section *1129* of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section *502*(b)(7) of this title.

Appendix A

(k)

(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

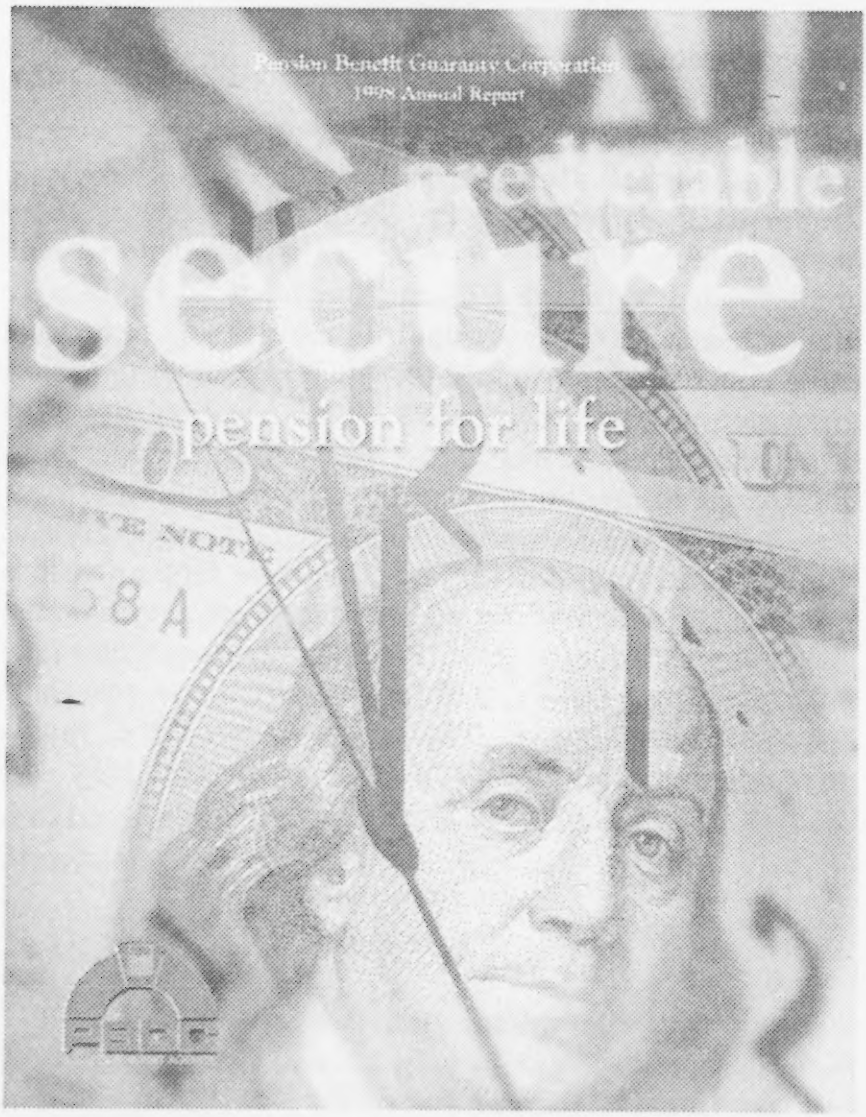
(3) The court may enter such protective orders, consistent with the need of the authorized

representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(l) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

* * * *

APPENDIX B — EXCERPTS FROM PBGC 1998 ANNUAL REPORT



Appendix B

* * *

[Excerpt from page 14]

LOSS PREVENTION

Under its Early Warning Program, PBGC continued to monitor more than 500 companies with pension plans underfunded by at least $5 million in order to identify transactions that could jeopardize pensions and to arrange suitable protections for those pensions and the pension insurance program. During 1998, PBGC negotiators reached agreements valued at nearly $1.1 billion with 35 companies, including Pepsico, Fruit of the Loom, Sunbeam, Pillowtex, and Inland Steel Company. These agreements provided contributions, security, and other protections for the pensions of about 257,000 workers and retirees. Loss prevention is PBGC's principal performance measure for its strategic goal of protecting existing defined benefit plans and their participants; with regard to these agreements, PBGC is able to report a loss prevention rate of 100 percent for 1998.

* * *

Appendix B

[Excerpts from page 23]

Financial Statements

MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

General

The following discussion and analysis provide information that management believes is relevant to an assessment and understanding of the Corporation's financial condition and results of operations. The discussion should be read in conjunction with the financial statements and notes thereto.

PBGC's operating results are subject to significant fluctuation from year to year depending on the frequency and severity of losses from terminating pension plans, general economic conditions, and other factors such as changes in law. Consequently, certain traditional financial ratios and measurements are not meaningful and therefore, not presented.

Combined Results

For 1998, PBGC's combined underwriting and financial activities resulted in a net gain of $1.653 billion on gross income of $3.250 billion. The single-employer and multiemployer programs reported a net income of $1.531 billion and $122 million respectively. By law, these two programs are separate.

Appendix B

SINGLE-EMPLOYER PROGRAM

Results of Activities and Trends: The net income in 1998 was $1.531 billion compared to net income of $2.612 billion in 1997. The $1.081 billion decrease was primarily attributable to the decrease in investment income.

Underwriting Activity: The gain of $462 million in 1998 was down from a gain of $897 million in 1997. This $435 million decrease was primarily due to (1) a decrease in premium income, (2) the one-time actuarial credit taken in 1997 as a result of the change in the method of calculating expenses incurred in determining and paying a participant's benefits, to more closely match the agency's annual claims-related expenses, and (3) an increase in losses from probable terminations.

Underwriting income decreased from $1.086 billion in 1997 to $976 million in 1998. The $110 million decrease relates primarily to the decrease in variable-rate premium payments.

The Corporation's losses from completed and probable plan terminations increased from $489 million in 1997 to $584 million in 1998. Although there were no major plan terminations in 1998, losses are unpredictable.

Operating costs remained level at $143 million.

Financial Activity: Investment income exceeded actuarial charges in 1998, resulting in a $1.069 billion gain versus a $1.715 billion gain in 1997. The total return on

investments was 14.4% in 1998, compared to 21.9% in 1997. Fixed-income investments experienced higher returns in 1998 than in 1997 while equity investment returns were lower. PBGC, in accordance with generally accepted accounting principles, marks its assets and liabilities to market.

Actuarial charges primarily resulted from the aging of the present value of future benefits and from changes in interest rates. In 1998, the select interest rate assumption decreased from 6.2% at September 30, 1997, to 5.7% at September 30, 1998, while the ultimate rate increased from 5.5% to 5.75%. The passage of time and change in the interest rates resulted in an actuarial charge of $1.034 billion in 1998, compared to an actuarial charge of $960 million in 1997.

* * * *

APPENDIX C — 58 FEDERAL REGISTER 50812 (SEPTEMBER 28, 1993)

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 2619 and 2676

RIN 1212-AA61

Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation ("PBGC") is amending its regulation governing valuation of plan benefits in terminated single-employer plans that are trusteed by the PBGC. The amendment revises the regulation's mortality assumptions to reflect recent acturial practice, (2) to uncouple the regulation's administrative expense ("loading") assumptions from its interest assumptions, and (3) to clarify the valuation of annuity benefits by prescribing a new interest rate structure that bases valuations on the length of time between the valuation date and the presumed date of each payment. Although the amendment continues the regulation's historical approach of assigning values to annuity benefits that are in line with private sector group annuity prices, and the PBGC anticipates that, for most plans, this amendment will not significantly affect the valuations produced, the new assumptions and structure will greatly enhance public understanding of the

PBGC's valuations. In addition, the PBGC is adopting unisex mortality assumptions when it is calculating de minimis lump sums (*i.e.*, those of $3,500 or less) to be paid to a participant; the PBGC is otherwise reserving the lump sum issue and therefore will otherwise continue to use its existing mortality assumptions and interest rate structure in the valuation of lump sum benefits.

At the same time, the PBGC is amending its regulation governing valuation of annuity benefits in multiemployer plans following mass withdrawal, so as to adopt the same mortality, loading, and interest assumptions as does the modified single-employer regulation. This change will result in simplification of calculations under the multiemployer regulation as well as greater consistency of annuity valuations between the two programs.

EFFECTIVE DATE: November 1, 1993.

FOR FURTHER INFORMATION CONTACT: Peter H. Gould, Senior Counsel, Office of the General Counsel, at the above address or at (202) 778-8850 ((202) 778-8859 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

On January 19, 1993, the Pension Benefit Guaranty Corporation ("PBGC") issued a notice of proposed rulemaking (58 FR 5128) that would alter the structure and assumptions used in its valuation of annuity benefits. The

proposed rule would revise the PBGC's methods of valuing annuity benefits by adopting (1) a new table of mortality assumptions to reflect recent actuarial practice, (2) an administrative expense ("loading") assumption to replace the previous adjustment in the interest assumption that simulated this charge, and (3) a new structure of interest assumptions that is based on the period of time between the valuation date of a benefit and the presumed date of each payment of the benefit. The PBGC proposed these changes because, although the PBGC's existing assumptions and structure accurately reflect private sector group annuity prices, the disparity between the PBGC's low interest rates and familiar private sector rates had resulted in public confusion. The new annuity valuation structure and assumptions would make the annuity valuation process clearer to the public, and would more clearly conform to the current practices of the private insurance industry in pricing of group annuity benefits. The proposed rule would also adopt unisex mortality assumptions for lump sum valuations; this change would conform the PBGC's practice to that of private sector pension plans. Finally, the proposed rule would apply to valuations under terminated multiemployer plans under 29 CFR part 2676 as well as under terminated single-employer plans under 29 CFR part 2619.

* * *

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No. 98-1440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bankruptcy claim of the Pension Benefit Guaranty Corporation ("PBGC") for unpaid minimum funding contributions is a prepetition claim arising from the prepetition services of employees, as opposed to an administrative expense claim.

2. Whether the bankruptcy claim of the PBGC for unfunded future benefit liabilities is properly calculated utilizing a discount rate establishing the claim's value "as of the date of the filing of the petition" pursuant to 11 U.S.C. § 502(b), as opposed to utilizing a discount factor prescribed by the PBGC which artificially inflates the claim for institutional purposes?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1440

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

Respondent United Steelworkers of America, AFL-CIO-CLC ("USWA") submits this brief in opposition to the petition for a writ of certiorari filed by the Pension Benefit Guaranty Corporation ("PBGC").

STATEMENT

1. Role of the United Steelworkers of America

The USWA is a labor organization with over 750,000 members. For decades, the USWA served as the collective bargaining representative of the vast majority of the

employees of CF&I Steel Corporation ("CF&I" or the "Debtor") in Pueblo, Colorado. The USWA bargained for and obtained comprehensive pension and health insurance programs enabling CF&I employees to earn vital retirement benefits.

The USWA was a key participant in the Chapter 11 bankruptcy of CF&I and its nine wholly-owned subsidiaries (collectively the "Debtors") filed in 1990. It preserved jobs by negotiating a new collective bargaining agreement ("CBA") with the purchaser of CF&I's assets. The USWA also served as the "authorized representative" of most of CF&I's retirees and their surviving spouses in negotiations over the modification of their right to lifetime retiree medical benefits. *See* 11 U.S.C. § 1114(b)(1). As authorized representative, the USWA negotiated, as part of a plan of reorganization ("POR"), the creation of a Voluntary Employees Beneficiary Association ("VEBA")[1] to provide ongoing, albeit reduced, medical and life insurance benefits.[2]

The POR created three Appeal Funds which will be distributed to either the PBGC or the VEBA and unsecured creditors depending on whether the PBGC ulti-

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[1] *See* Internal Revenue Code ("IRC") Section 501(c)(9), 26 U.S.C. § 501(c)(9).

[2] Claims for future medical benefits for retirees, who are also beneficiaries of the pension plan at issue, were settled by the funding of the VEBA. Retirees continued to receive retiree medical benefits during the bankruptcy pursuant to Bankruptcy Code Section 1114, 11 U.S.C. § 1114. Subsection 1114(e)(1) requires the continuation of such payments in the absence of a court-ordered modification, and Subsection 1114(e)(2) specifically defines such payments as administratve expenses ("any payment for retiree benefits required to be made before a plan confirmd under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title."). *See* ***infra***, p. 18.

mately prevails with regard to the issues relating to the respective Appeal Funds. Pet. App. 13a n.6; C.A. Aplt. App. 61-64.

2. The PBGC and The Pension Insurance Program

The PBGC is a government corporation established to administer ERISA's pension-plan insurance and termination provisions. 29 U.S.C. §§ 1301-1461. The PBGC may move unilaterally at any time to terminate pension plans for various reasons, including a sponsor's failure to make minimum funding contributions or if "the risk to the insurance program may increase unreasonably if the plan is not terminated." Pet. 5; 29 U.S.C. § 1342(a).[3]

When a pension plan is terminated by the PBGC, the PBGC assumes the plan sponsor's payment obligations to the extent and amount of the PBGC's statutory payment guarantees for nonforfeitable benefits. 29 U.S.C. § 1322(a).[4] This is a "mandatory Government insurance program." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 637 (1990).

Following a termination, the PBGC acquires a right to recover from the plan sponsors the plan's "Unfunded Benefit Liability" ("UBL"). The UBL claim is defined "for purposes of" Title IV of ERISA as the present value of future benefits earned by current and former employees under the plan, to the extent the pen-

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[3] *See, e.g., Jones & Laughlin Hourly Pension Plan* v. *LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) (court upholds PBGC termination of pension plans, rejecting action by USWA seeking to block termination).

[4] There are limitations to the PBGC's guarantee, including a maximum monthly benefit, a phase-in rule for benefits adopted within five years of the termination, and no guarantee for benefits that become vested only because of the plan termination. 29 U.S.C. § 1322(a), (b); *see genrally PBGC* v. *LTV Corp.*, 496 U.S. 633 637-38 (1990).

sion trust fund assets are insufficient to pay for these benefits. 29 U.S.C. §§ 1301(a)(16), 1301(a)(18), 1362(b); C.A. Aplt. App. 49. The PBGC, in its capacity as successor trustee of a terminated plan, also acquires a right to recover from the sponsor unpaid "Minimum Funding Contributions." 29 U.S.C. § 1362(c). This "contribution" claim is equal to the difference between the amount that a plan's enrolled actuary certifies that a sponsor should contribute to the plan to amortize the funding obligation for past and current benefit accruals and the amounts actually contributed. C.A. Aplt. App. 41-42.

The PBGC obtains its revenues from employer premiums, investment income, assets collected from terminated plans, and recoveries on claims against sponsors of terminated plans. Pet. 4. While asserting that its insurance program has historically operated at a financial deficit, PBGC also acknowledges that it closed 1996 and 1997 very much in the black. Pet. 19. Indeed, since the filing of the Petition, the PBGC announced a year-end surplus for 1998 of $5.012 billion in the relevant single-employer plan program, following year-end surpluses achieved in 1997 and 1996 in the same program of $3.481 billion and $869 million, respectively.[5] These surpluses were

[5] *See* 1998 PBGC Ann. Rep. 2 (in the last five years "PBGC has built a strong insurance program and solid financial foundation through hard work and sound management."); 1997 PBGC Ann. Rep. 3 ("We have achieved a surplus which can serve as a cushion to protect workers and retirees *in the event of a future economic downturn*." (emphasis added)); 1996 PBGC Ann. Rep. 1 ("While pension underfunding increased in 1995 in large part because of a decline in interest rates, reforms for premiums paid by underfunded plans increased premium revenues by more than 35 percent to nearly $1.2 billion to keep the insurance program strong. Other reforms from the Retirement Protection Act of 1994 *are in place to address the underfunding over time*." (Emphasis added)).

PBGC's assertion that it has suffered a "loss of nearly a quarter billion dollars" as a result of the events in this case, Pet. 3, is

achieved without, to USWA's knowledge, the PBGC obtaining a full recovery on its asserted UBL and contribution claims in any bankruptcy proceeding.

3. The CF&I Bankruptcy Proceedings

At the time of the bankruptcy filing, CF&I was the sponsor and administrator of a defined benefit pension plan (the "Master Plan"). C.A. Aplt. App. 19, 40. Pursuant to the terms of the Master Plan, CF&I promised to provide fixed pension benefits and to fund the Master Plan based on the actuarial valuation of the benefits earned by employees. C.A. Aplt. App. 19-20.

In 1988 and 1989, CF&I made required pension funding payments of $15 million and $16.603 million, respectively, and was current on all required contributions. On September 15, 1990. CF&I failed to make a minimum funding payment. Despite CF&I's compliance with the statutory funding requirements up until this date, the Master Plan was significantly underfunded, largely due to past economic downturns, reduced employment, and a resulting major increase in retirements. C.A. Aplt. App. 76.

On November 7, 1990, twenty-three days after the missed contribution, the Debtors filed Chapter 11 petitions, in large part, because of insolvency caused by their inability to fund the Master Plan. Pet. App. 81a; C.A. Aplt. App. 20, 40, 76.

On March 19, 1992, sixteen months following the bankruptcy filing, and after repeated attempts by CF&I

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misleading and incorrect, *inter alia*, because it does not refer to its overall financial status. *See also infra*, p. 23 n.34. Further, PBGC exists largely to insure the defined benefit pension system. Like any other insurance company, the PBGC collects premiums and invests its funds. The PBGC uses its assets to cover instances where it is unable to obtain a complete recovery from insolvent employers.

before and the Debtors following the bankruptcy to persuade PBGC to do so, the PBGC terminated the Master Plan, based, in part, on the Debtors' failure to make the required 1990 minimum funding payments. Pet. App. 81a-82a; C.A. Aplt. App. 20-21, 40, 68. The PBGC became liable for the benefits earned by plan participants and guaranteed by the PBGC.

The PBGC filed proofs of claim against each of the Debtors asserting: (1) the contribution claim for the period prior to termination and (2) a UBL claim. C.A. Aplt. App. 20, 40-41. The PBGC ultimately filed amended proofs of claim, asserting a Minimum Funding Claim of $64,874,511 and a UBL claim of $263,200,000 against each Debtor. The PBGC asserted that both claims were entitled to tax and administrative priority.[6] Pet. App. 82a; Aplt. App. at 21, 41. Litigation ensued on the Debtors' objections to the priority and calculation of this claim with the USWA as an active participant.

A consolidated plan of reorganization was confirmed based on a sale of substantially all of the Debtor's assets.

4. Decisions Below

The bankruptcy court held that the PBGC's contribution claim was not entitled to priority as postpetition administrative expenses pursuant to 11 U.S.C. § 503(b)(1)(A) (except to the extent of $1,565,198 attributable

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[6] The PBGC raised a panoply of arguments in support of such priority treatment, including assertions that tax liens "arose" postpetition despite the application of the automatic stay. 11 U.S.C. § 362. The PBGC apparently also considered these arguments key to its "mission," but has abandoned them along the way. It also chose not to petition for certiorari from the Tenth Circuit's decision in *PBGC* v. *Skeen (In re Bayly Corp.)*, 163 F.3d 1205 (10th Cir. 1998), which rejected the PBGC's assertion of tax and administrative priorities for its UBL claim.

to the postpetition labor of the Debtors' employees, *i.e.*, the "normal cost" component), because it arose from the prepetition labor of CF&I's employees and was not an actual and necessary expense of preserving the Debtors' estates. Pet. App. 67a-68a, 91a. With respect to the UBL claim, the bankruptcy court held a further hearing to determine the allowance of the claim.

PBGC representatives acknowledged in testimony that, in calculating its UBL claim, the PBGC had adopted a discount factor to approximate the cost of private annuity contracts rather than a discount rate to reflect the true economic value of the PBGC's loss. By selecting a low discount factor to reflect the group annuity market, the PBGC sought to further its institutional goal of making plan terminations less attractive than the purchase of close-out annuities. C.A. Aplee. App. 53, 68, 70, 98. These witnesses further testified that the PBGC does not invest its funds in the group annuity contracts that formed the basis of its discount factor, but rather invests in the very markets that the Debtors argued should form the basis for determining a "prudent investor" discount rate. C.A. Aplee. App. 65, 66, 91, 92, 100-102.

The bankruptcy court acknowledged that the discount factor provided in the PBGC's regulations (as applied here, 6.5%) was designed in part to enhance the PBGC's own claim and that adopting that rate "will severely impact the distribution to other similarly situated creditors." It concluded, nonetheless, that deference to the PBGC and its regulations required approval of the 6.5% factor to calculate the present value of the PBGC's UBL Claims, resulting in a claim of over $220 million (having reduced the filed UBL claim by the amount of the contribution claim). Pet. App. 72a-75a.[7]

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[7] The court rejected the Debtors' 12.3% market-based "prudent investor" discount rate, which reflected the reasonable earning

The district court affirmed the bankruptcy court's priority determinations (Pet. App. 46a-48a), but remanded the case for "an independent discount rate determination without any deference to the position of the PBGC." It concluded that "[t]he bankruptcy court applied the wrong standard of review in giving deference to PBGC's interpretation." Pet. App. 52a, 54a-55a. The district court held that "present value calculations relating to pension termination liability must be determined according to bankruptcy law." Pet. App. 51a-52a.

On remand, the bankruptcy court rejected the PBGC's discount factor and instead adopted the Debtors' 12.3% "prudent investor" discount rate, resulting in an unsecured claim of $124.441 million. Pet. App. at 27a-40a. The court held that the PBGC's discount factor "was not representative of future investment yields or any rate of return," was inconsistent with Bankruptcy Code standards of equal treatment of creditors, and served the PBGC's own "institutional goal." Pet. App. 35a-38a. The district court affirmed, concluding that the PBGC's discount factor was "creditor specific" and "inconsistent with ascertaining the true present value of the unfunded claims." Pet. App. 21a-22a.

The court of appeals affirmed the district court's decision. With regard to the contribution claim, it noted that Congress did not amend the Bankruptcy Code to provide administrative priority for contribution claims, as it did for other retiree-related bankruptcy claims in 11 U.S.C. § 1114.[8] The court of appeals held that the contribution claims were classic prepetition claims the consideration for

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power of money in a balanced portfolio, while noting that the rate was "carefully developed analyzing genally accepted source material used in financial markets." *Id.* at 73a.

[8] *See infra*, p. 18.

which was the prepetition labor of the Debtors' employees. Pet. App. 9a-13a.

In relation to the UBL claim, the court of appeals emphasized that, pursuant to 11 U.S.C. § 502(b), the claim must be discounted and valued as of the petition date. The court held that only the use of the prudent investor rate would insure "the relative equality of payment between claims that mature in the future and claims that can be paid on the date of the bankruptcy." The court concluded that the discount assumptions in regulations promulgated by the PBGC define such liabilities for purposes of ERISA only, apply to only one bankruptcy creditor, and conflict with the Bankruptcy Code's requirement that similar claims be treated alike. Pet. App. 13a-15a.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT THE PETITION

The legal issues raised by the PBGC do not warrant a grant of the Petition. As demonstrated *infra*, there is no conflict between the decision below and decisions of this Court or other courts of appeals. Only the PBGC suggests that there is uncertainty about the priority and calculation of its bankruptcy claims. In fact, there is a telling consistency of approach and outcome by courts in considering these claims.

Perhaps recognizing the otherwise limited merits of its Petition, the PBGC emphasizes policy and financial considerations. Pet. 12-21. While the desire of the PBGC to improve its financial position is understandable, review of the issues raised in the Petition is not necessary or essential to the public interest or the PBGC's authority and ability to carry out its "mission."

First, the PBGC is not suffering financial distress. Even if the PBGC were not running so clearly in the black, this case would not involve a potential call on the public treasury. The PBGC does not operate with government funds. Pet. 4, 6.[9]

Second, this case concerns bankruptcy claims, not "significant administrative law questions." *Compare LTV*, 496 U.S. at 644. There is no issue raised in this case concerning PBGC's regulatory authority to terminate a defined benefit pension plan either: (1) during a bankruptcy, at a time of the PBGC's choosing, based on a sponsor's failure to make contributions[10] or (2) prior to bankruptcy if the necessary statutory standards are met. This Court has already upheld the PBGC's authority to restore a pension plan where there is financial improvement by an employer sponsor during the course of a bankruptcy. *Id.* There is also no issue raised about the valuation of the PBGC's claims outside of bankruptcy. This case only concerns the determination of the PBGC's claims in bankruptcy, specifically the priority of the PBGC's contribution claims and the interest rate to be utilized in allowing the PBGC's UBL claim.

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[9] The PBGC raises the spectre of "perverse economic incentives" and "abuse" resulting from the application of established rules of bankruptcy to its claims. Pet. 11, 14. These arguments miss the point. The disadvantages of bankruptcy are obvious and daunting to any entity contemplating a bankruptcy filing. However, Congress assumed that plan terminations in bankruptcy proceedings were likely and appropriate, and provided for the bankruptcy court to make determinations in regard to distress terminations. 29 U.S.C. § 1341(c)(2)(B)(i), (ii). Of course, any dissatisfaction with the current balance of competing bankruptcy interests is for Congress to resolve.

[10] Indeed, while declining to provide administrative or tax priority for PBGC's contribution claims, Congress specifically provided in ERISA that the PBGC can terminate a plan "notwithstanding" the pendency of a bankruptcy proceeding. 29 U.S.C. § 1342 (e), (f).

Congress has chosen not to enact improved priorities for the PBGC's bankruptcy claims. *See infra*, pp. 18-19. Congress has, however, provided many tools and powers to strengthen the PBGC's finances, including increased premiums,[11] liens that may be perfected outside of bankruptcy,[12] increased employer termination liability,[13] additional claims under the Internal Revenue Code for an "accumulated funding deficiency" whether or not such claims are treated as taxes in a bankruptcy,[14] and the imposition of joint and several liability for all members of an employer's controlled group.[15] The PBGC, armed with the "big stick" of potential plan termination, has also been able to obtain increased plan funding and security for such funding through its "Early Warning System," which monitors transactions proposed to be undertaken by companies largely not in bankruptcy.[16]

Thus, the PBGC has achieved three consecutive, substantial annual surpluses in the single employer program of $869 million, $3.481 billion, and $5.012 billion. While the PBGC obviously would like to further improve its financial recoveries in a bankruptcy, that desire does not constitute a basis for granting the petition. The importance of a regulatory agency's policies simply does not

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[11] 29 U.S.C. § 1306; *see also LTV Corp.*, 496 U.S. at 638.

[12] 29 U.S.C. § 1368.

[13] 29 U.S.C. § 1362(b)(1); *see also LTV Corp.*, 496 U.S. at 638 n.2.

[14] 26 U.S.C. § 4971; *see United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

[15] 29 U.S.C. § 1362(a).

[16] 1998 PBGC Ann. Rep. 14 ("During 1998, PBGC negotiators reached agreements valued at nearly $1.1 billion with 35 companies, including Pepsico, Fruit of the Loom, Sunbeam, Pillowtex, and Inland Steel Company. These agreements provided contributions, security, and other protections for the pensions of about 257,000 workers and retirees.").

provide a basis for the courts to adjust the treatment of an agency's claim in a bankruptcy proceeding, a matter which is instead a "legislative decision." *Nathanson* v. *NLRB*, 344 U.S. 25, 28-29 (1952).

II. THE TENTH CIRCUIT CORRECTLY DETERMINED THE PRIORITY OF THE PBGC'S MINIMUM FUNDING CLAIMS

There is no compelling reason for this Court to review the court of appeals' determination that the PBGC's minimum funding claims are not entitled to administrative priority under the Bankruptcy Code Section 503(b)(1)(A).[17] It is well established—and the PBGC does not appear to dispute—that it is the Bankruptcy Code which determines the priority of a claim in bankruptcy. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). The court of appeals' decision interpreting the priority provisions of the Bankruptcy Code is consistent with the decisions of two other courts of appeals and the overwhelming body of other case law on precisely the same question. It is also consistent with the analysis uniformly employed to determine whether a claim qualifies as an administrative expense under the Bankruptcy Code, as well as this Court's decision in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), which requires that a bankruptcy claim arise postpetition in order to be considered an administrative claim.

1. The two courts of appeals other than the Tenth Circuit that have addressed the priority of the PBGC's contribution claims have agreed that minimum funding

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[17] The bankruptcy court held that the portion of the PBGC's minimum contribution claim attributable to the post petition service of employees (the "normal cost") was entitled to administrative expense status. Pet. App. 67a-68a. The only issue litigated on appeal has been the status of the non-normal cost component of the contribution claim.

claims not attributable to the normal cost do not arise postpetition, are based on the prepetition labor of employees, and thus are prepetition claims not entitled to administrative expense status. *PBGC* v. *Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 817-18 (6th Cir. 1997); *PBGC* v. *LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990).[18]

Lower court decisions that have addressed the same issue are in accord. *See LTV Corp.* v. *PBGC (In re Chateaugay Corp.)*, 115 B.R. 760, 774-75 (Bankr. S.D.N.Y. 1990) ("*LTV I*"), *aff'd*, 130 B.R. 690, 697 (S.D.N.Y. 1991) ("*LTV II*"), *vacated on consent of the parties*, 17 Empl. Ben. Cas. (BNA) 1102 (S.D.N.Y. 1993); *In re Finley, Kumble, Wagner, Heine, Underburg, Manley, Myerson & Casey*, 160 B.R. 882, 892 (Bankr. S.D.N.Y. 1993);[19] *In re Kent Plastics Corp.*, 183 B.R. 841, 847 (Bankr. S.D. Ind. 1995); *In re Simetco*, 1996 Bankr LEXIS 1399 (Bankr. N.D. Ohio 1996).[20]

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[18] These decisions linking the priority of benefit fund contributions to the time when the labor providing the consideration for such contributions was provided are also consistent with the provisions of 11 U.S.C. § 507(a)(4). Section 507(a)(4) provides a prepetition priority for benefit fund contributions "arising from services rendered" within a certain period prior to the filing of the bankruptcy petition. The PBGC asserted and was granted priority treatment pursuant to Section 507(a)(4) for certain of its contribution claims. Pet. App. 64a-67a. The PBGC's assertion that contribution obligations are separate from obligations to participants, Pet. 28, is inconsistent with the clear provisions of Section 507(a)(4), as well as Section 503(b)(1)(A) and applicable case law.

[19] The *Finley, Kumble* court noted that the vacatur of the *LTV* decisions does not undermine the persuasive authority of these "logical and well reasoned decision[s]." *Finley, Kumble*, 160 B.R. at 898.

[20] PBGC attempts to create a body of conflicting law where none exists. Pet. 20 n. 14, 26. It cites three cases which did not involve

2. This case law is also consistent with the analysis utilized by the courts of appeal generally for determining whether a claim is entitled to administrative expense status. In *Cramer* v. *Mammoth Mart., Inc. (In re Mammoth Mart)*, 536 F.2d 950, 954-55 (1st Cir. 1976), the First Circuit, reviewing prior case law, including this Court's decision in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), articulated the now widely accepted standards for determining when a claim in bankruptcy arises and the resulting priority of the claim. The court held that a "claim," defined by the Bankruptcy Code as a "right to payment," [21] is entitled to administrative priority status

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claims by the PBGC and which are not relevant here. The decisions in *In re Penn Cent. Transp. Co.*, 484 F.2d 1300 (3d Cir. 1973), and *Tate* v. *New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964), arose pre-ERISA under the former Bankruptcy Act's specialized provisions and past practice concerning railroad reorganizations, cases where the railroad's general authority to pay pension benefits was not challenged and where the courts emphasizd the unique characteristics of the railroad industry. As this Court noted in relation to bankruptcy provisions prohibiting any modification of railroad collective bargaining agreements, such provisions "are reflective of longstanding special treatment afforded railway labor." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n. 8 (1984) (citation omitted).

The decision in *Wyle* v. *Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476 (9th Cir. 1983), another Bankruptcy Act case, is similarly irrelevant. It concerned undefined "benefit fund" contributions which, unlike the claims here, were for post-petition services, but "were computed with reference to" hours worked prepetition, which were merely "units of measure." *Id.* at 479.

A fourth case, *Columbia Packing Co.* v. *PBGC*, 81 B.R. 205 (D. Mass. 1988), is a badly reasoned and singular departure from consistent precedent, including decisions of the First Circuit. *See infra*, pp. 15-16 n. 23.

[21] Section 101(5)(A) of the Bankruptcy Code defines "claim" broadly as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, ma-

only to the extent that it arises postpetition out of a transaction or relationship with the debtor-in-possession, separate from any preexisting obligation, and that a contractual claim will be afforded administrative claim status only when the underlying consideration was supplied to and beneficial to the debtor-in-possession.[22] *Mammoth Mart*, 536 F.2d at 954-55. *Accord Isaac* v. *Temex Energy, Inc. (In re Amarex)*, 853 F.2d 1526, 1531 (10th Cir. 1988); *Christian Life Ctr. Litig. Defense Comm.* v. *Silva*, 821 F.2d 1370, 1374 (9th Cir. 1987); *Trustees of Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986); *Matter of Jartran*, 732 F.2d 584, 587 (7th Cir. 1984).

Many of these decisions carefully distinguish between the time when, for bankruptcy purposes, the "claim" arises, *i.e.*, when the acts giving rise to the "right to payment" are performed, and the time when a cause of action accrues, *i.e.*, when the obligation comes due and is not met. *See, e.g., Sunarhauserman*, 126 F.3d at 819; *Amarex*, 853 F.2d at 1531; *McFarlin's* 789 F.2d at 101; *see also LTV I*, 115 B.R. at 775. The Tenth Circuit's decision was consistent with this line of authority in determining that the PBGC's minimum funding contribution claim is entitled to administrative expense priority only to the extent it is based upon services provided postpetition. Pet. App. 9a-13a; *see also Sunarhauserman*, 126 F.3d at 817 ("an absolute requirement for administrative expense priority [is] that the liability at issue arise postpetition").[23]

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tured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A).

22 The court was interpreting general statutory provisions regarding administrative claims, rather than bankruptcy legislation aimed at specific claims. *See infra*, p. 18.

23 In *Columbia Packing*, 81 B.R. at 210-11, the only case that awarded administrative expense status to the PBGC's contribution

3. The decision below is also consistent with the decision of this Court in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). In *Reading*, this Court held that the *post-petition* negligence of a bankruptcy trustee gave rise to an administrative tort claim by the injured party under the former Bankruptcy Act as an "actual and necessary cost" of administration of the bankruptcy estate (regardless of whether payment was essential to the reorganization of the business), because the acts giving rise to the claim—a fire which spread to a neighboring property—occurred postpetition. *Id.* at 484. The court of appeals' decision was consistent with *Reading* in holding that the PBGC's minimum funding contribution claim (other than the normal cost) is not entitled to administrative priority because the acts giving rise to the claim, the employees' services, occurred prepetition.

The PBGC, citing *Reading* and other cases (Pet. 25 n.17, 26-27, 28 n.19, 29 n.20), argues that its minimum funding claim is statutory or regulatory in nature and automatically entitled to administrative claim status because it falls due postpetition. As noted, PBGC fails to recognize that the acts giving rise to the tort claim in *Reading* occurred postpetition. PBGC also fails to recognize that courts have afforded administrative claim status to certain environmental claims,[24] tax claims under the

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claim, the court departed from this otherwise consistent analysis, confused a claim with a cause of action, and essentially rested priority on the date the contributions were due. *See LTV I*, 115 B.R. at 777 (criticizing *Columbia Packing* and its departure from established framework for determining administrative expense status).

[24] *Cumberland Farms* v. *Florida Dep't of Envtl Protection*, 116 F.3d 16, 20-21 (1st Cir. 1997) (fine for debtor's postpetition violation of state environmental laws); *Alabama Surface Mining Comm'n* v. *N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) (penalty for debtor's postpetition violation

Coal Industry Health Benefit Act,[25] and other claims involving regulatory schemes[26] because in these cases the claims, whatever the label, also arose postpetition. Thus, the alleged "statutory" nature of a claim is not determinative of administrative priority. In any event, the contribu-

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of state environmental laws); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (claim for government reclamation costs incurred postpetition); *Lancaster* v. *Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123-124 (6th Cir. 1987) (claim for state clean-up costs based on bankruptcy trustee's failure to maintain estate postpetition in accordance with state environmental laws); *compare In re Bill's Coal Co.*, 124 B.R. 827, 829-30 (D. Kan. 1991) (penalties assessed for prepetition violation of state environmental laws are not administrative expenses).

[25] *UMWA 1992 Benefit Plan* v. *Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1279 (10th Cir. 1998) (Coal Act premiums accrued postpetition constituted a "tax" incurred by the estate and entitled to priority under 11 U.S.C. § 503(b)(1)(B); *Adventure Resources, Inc.* v. *Holland*, 137 F.3d 786, 794-95 (4th Cir.) (Coal Act premiums constituted a "tax" which arose postpetition after the Funds' entitlement to premiums came into effect), *cert. denied*, 119 S. Ct. 404 (1998); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 497 (2d Cir. 1995) (obligation to contribute to coal miners' health fund was administrative expense because it was an obligation which arose from the Coal Act, which was enacted six years after Chapter 11 petition filed; obligation also was an administrative expense as "tax" incurred by the estate).

[26] *Potter* v. *CNA Ins. Co. (In re MEI Diversified, Inc.)*, 106 F.2d 829, 831-32 (8th Cir. 1997) (penalty for postpetition failure to meet obligation to pay workers' compensation insurance premiums, where payment was required under state law in order for employer to be permitted to operate); *Spunt* v. *Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200, 202 (1st Cir. 1985) (postpetition violation of injunction against nuisance); *Yorke* v. *NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983) (bankruptcy trustee's postpetition failure to bargain over effects of postpetition shutdown in violation of labor law).

tion claims involved here are contractual in nature and arose prepetition.[27]

As the PBGC has previously acknowledged, there is no statutory obligation for an employer to establish a pension plan. The minimum funding provisions of ERISA and the Internal Revenue Code create a mandatory schedule pursuant to which employers who have established pension plans are required to amortize their contractual liability for their employees' past service credit. The obligation to pay—and the "right to payment"—arise from the labor of the employer's employees. The court of appeals properly determined that the timing of that labor determines the priority status of the PBGC's minimum funding claim.

4. As this Court emphasized nearly half a century ago, in bankruptcy, "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson*, 344 U.S. at 29. Of course, Congress can effectuate policies it deems important by amending the Bankruptcy Code to explicitly provide priority treatment for a claim that might otherwise not be entitled to such treatment. Congress did just that when it enacted Section 1114 of the Code, 11 U.S.C. § 1114, following LTV's postpetition, unilateral termination of medical benefits for retirees largely represented by the USWA. Congress provided that the payment of retiree benefits due during the bankruptcy "has the status of an allowed administrative expense." 11 U.S.C. § 1114(e)(2).

Between 1991 and 1993, in a series of proposed bills, the PBGC and its allies sought congressional reversal of

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[27] The dissent in *Sunarhauserman* mistakenly viewed the obligation as "statutory," and then mistakenly concluded that all statutory claims were entitled to administrative claim status. *Sunarhauserman*, 126 F. 2d at 822 (dissenting opinion).

the *LTV* decisions denying administrative priority to the PBGC's minimum contribution claims. *See, e.g.*, 102 H.R. 3843, 102nd Cong., 1st Sess. (1991) (a bill to, *inter alia*, amend Section 503 of the Bankruptcy Code to provide administrative priority status to unpaid pension fund contributions); 102 H.R. 4200, 102nd Cong., 2d Sess. (1992) (same); 102 H.R. 4545, 102nd Cong., 2d Sess. (1992) (same); 102 S. 2014, 102nd Cong., 1st Sess. (1991) (same); 102 S. 2485, 102nd Cong., 2d Sess. (1992) (same); *see also* 138 Cong. Rec. S. 8241, 8268-69 (1992) (statement of Sen. Graham regarding proposed 102 S. 1985, 102nd Cong., 2nd Sess. (1992)); 139 Cong. Rec. S2610-2613 (1993) (statements of Sens. Heflin and Grassley regarding proposed amendments to proposed 103 S. 540, 103rd Cong., 1st Sess. (1993)); *Finley, Kumble*, 160 B.R. at 893 n.24 (reviewing legislative proposals). These efforts were all unsuccessful. There is no reason for this Court to step in where Congress has chosen not to tread.

III. THE TENTH CIRCUIT CORRECTLY DETERMINED THE DISCOUNT RATE TO BE UTILIZED IN ALLOWING THE PBGC'S UBL CLAIM

There is no compelling reason for this Court to review the Tenth Circuit's determination that the PBGC's UBL claim can only be allowed utilizing a discount rate consistent with the Bankruptcy Code. The regulation advanced by the PBGC in this case is obsolete and inappropriate for review. There is no conflict among the courts of appeals. The decision below is consistent with the only other two decisions on point, and was mandated by the requirements of 11 U.S.C. § 502(b) that claims be valued as of the date of the bankruptcy petition. PBGC's heightened rhetoric cannot obscure a relatively narrow and unremarkable issue involving the allowance of the PBGC's claim in bankruptcy using an interest rate that is consistent with the Bankruptcy Code.

1. Because the regulation regarding valuation of plan benefits on which the PBGC centers its case has been amended since the determination of the PBGC's claim in this case, this is not an appropriate case for review. The PBGC concedes that the regulation has been superseded. Pet. 6 n.5. In 1993, among other changes, the PBGC updated the mortality tables, eliminated an adjustment to the interest rate for administrative expenses in favor of a separate load charge for expenses, and adopted a new structure of interest assumptions based on the length of time between the valuation date and the presumed date of each payment. *See* 58 Fed. Reg. 50812 (September 28, 1993). Among the PBGC's stated reasons for the changes was the need to address an apparent "disparity between the PBGC's low interest rates and familiar private sector rates" for group annuity contracts and to "more clearly conform to the current practices of the private insurance industry in pricing" such contracts. *Id.*[28] Because the valuation regulation which the PBGC seeks to apply to its UBL claim is now obsolete, the Petition should not be granted.

2. The decision of the court of appeals is not in conflict with the decision of any other court of appeals, and, as conceded by the PBGC (Pet. 14 n.10), is in complete accord with the only two other court decisions on this issue, both of which utilized the "prudent investor" discount rate adopted here. *LTV II*, 130 B.R. at 695-96 and *LTV Corp.* v. *PBGC (In re Chateaugay)*, 126 B.R. 165 (Bankr. S.D.N.Y. 1991) ("*LTV III*"), *vacated on consent of the parties*, 17 Empl. Ben. Cas. (BNA) 1102 (S.D.N.Y. 1993); *Belfance* v. *PBGC (In re CSC Industries, Inc.)*, No. 95-4103 (Bankr. N.D. Ohio Dec. 3,

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[28] The 1993 regulation was later replaced by the current version of the regulation. 61 Fed. Reg. 34002 (July 1, 1996).

1997), *appeal docketed*, No. 4:99CV00041 (N.D. Ohio Jan. 8, 1999).[30]

3. The court of appeals' decision was mandated by Section 502(b) of the Bankruptcy Code. Section 502(b) requires that the bankruptcy court "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition." 11 U.S.C. § 502(b). Consistent with the requirements of Section 502(b), where a claim is comprised of future liabilities to be paid over time, the claim must be reduced to present value so that its value does not exceed the value of similarly situated claims. *LTV III*, 126 B.R. 165, 175 (Banker S.D.N.Y. 1991); *In re Caudill*, 82 B.R. 969, 976-77 (Bankr. S.D. Ind. 1988). The use of a low interest rate designed to achieve agency-specific institutional goals to calculate a bankruptcy claim is not consistent with bankruptcy law.

In applying Section 502(b), the court of appeals correctly followed established principles of claims determination. As this Court recognized in *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161-62 (1946), a case not cited in the Petition, once the bankruptcy court calculates the gross value of a claim under nonbankruptcy law, it must then "decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act." *Id.* at 162.[30]

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[29] The PBGC's fear that because there are two levels of review of a bankruptcy court's decision, *see* 28 U.S.C. § 158, a "conflict" may be long in the making (Pet. 20), is pure conjecture and does not provide grounds to grant the Petition.

[30] The leading bankruptcy treatise (one section of which is cited out of context by the PBGC (Pet. 23)), confirms that after a bankruptcy court determines the amount of a claim under nonbankruptcy law, it must determine the allowability of the claim under

In holding that a claim for interest on interest was not allowable under the Bankruptcy Act,[31] the *Vanston* Court reviewed bankruptcy considerations at the claims allowance stage. In determining what claims are allowable under bankruptcy law, the Court held that "bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles." *Id.* at 162-63. *See also LTV I*, 115 B.R. at 769-70.[32]

Thus, in discounting claims for future payments to their present value, a bankruptcy court must determine the discount rate that is appropriate to calculate the claim as a matter of bankruptcy law. *See LTV I*, 115 B.R. at 769-770; *LTV III*, 126 B.R. at 172; *Caudill*, 82 B.R. at 978.[33] Consistent with the determination of a claim payable in the future, the rate must reflect the amount of

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bankruptcy law. *Compare* 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 502.03[1][a] (15th rev. ed. 1998) *with id.* at ¶ 502.03 [1][c] (". . . although the existence of a claim is controlled by state or other federal law, the allowance or disallowance of a claim in bankruptcy is a matter of federal law left to the bankruptcy court's exercise of its equitable powers.").

31 Precedent under the Bankruptcy Act remains pertinent to current bankruptcy jurisprudence. *See CF&I*, 518 U.S. at 220-21; *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990).

32 Administrative law cases cited by the PBGC, Pet. 22-23, did not involve bankruptcy claim proceedings and are not relevant here. Indeed, as the court of appeals emphasized, ERISA's definition of the PBGC's termination claim is provided for purposes of ERISA only. Pet. App. 13a.

33 Bankruptcy courts "are often and routinely called upon to determine the present value of projected future payments, the value of a claim payable over time, and the value of a recovery which is in the form of payments over time pursuant to a plan of reorganization." *LTV I*, 115 B.R. at 769.

money needed to fulfill the obligation in the future. Courts that have considered this issue have utilized "the rate of return available to a reasonable, prudent, pension fund investor who invests in a 'prudent' portfolio." *LTV III*, 126 B.R. at 177.

By contrast, the low discount rate selected by the PBGC is, as PBGC concedes, intended to replicate the price to be charged by a private insurer issuing an annuity contract; is designed to deter an employer from terminating a plan by inflating the size of the UBL claim; and is not intended to reflect the future earning power of money "but instead serves to promote the PBGC's own institutional goal of making plan terminations less attractive than the purchase of closeout annuities." Pet. App. 36a. As such, the artificially low rate contrived by the PBGC would enhance its claim well beyond the amount needed to fund the benefits in the future, and would result in a greater pro rata recovery than similarly situated creditors.[34]

4. The application of Section 502(b) manifests the Bankruptcy Code's guiding principle that similarly situated creditors receive equal treatment.[35] That equal treatment may result in a dichotomy between a liability under non-

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[34] Thus, to the extent that the PBGC has suffered a "loss" as a result of this plan termination (*compare supra*, pp. 4-5 n. 5), that loss is not "nearly a quarter of a billion dollars," (Pet. 3), which is the liability established under ERISA to promote the PBGC's institutional goals. Rather, the "loss" is $124,441 million, the bankruptcy claim allowed below, which reflects the actual economic value of the PBGC's "loss" measured by use of a discount rate consistent with the requirements of the Bankruptcy Code.

[35] *Begier* v. *IRS*, 496 U.S. 53, 58 (1990); *Embassy Restaurant*, 359 U.S. at 31; *Nathanson*, 344 U.S. at 29. *See also In re O.P.M. Leasing Servs., Inc.*, 79 B.R. 161, 167 (Bankr. S.D.N.Y 1987) ("To assure equality of treatment of creditors at distribution" such creditor "should be entitled to collect from the debtor only the discounted value of his claim as of the petition date.")

bankruptcy law and a claim as measured in a bankruptcy proceeding is not in any way unusual or unprecedented. By virtue of the bankruptcy court's authority—and mandate—to maintain the equality of treatment of similarly situated creditors and to determine allowability pursuant to bankruptcy law, the value of any claimant's bankruptcy claim may well diverge from the claimant's rights to recovery under nonbankruptcy law.[36]

In the analogous context of the interest rate to be applied to Internal Revenue Service claims for deferred payments of federal taxes owed by a debtor, courts have disregarded the statutory interest rate provided for by Internal Revenue Code § 6621, 26 U.S.C. § 6621. They have concluded that such a rate serves the federal tax objective of deterring taxpayers from "borrowing" from the Internal Revenue Service, and that bankruptcy principles governing the treatment of claims require application of a market rate approximating the rate at which the debtor could obtain a loan from a commercial lender of equivalent amount and duration.[37]

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[36] *See Associates Commercial Corp.* v. *Rash*, 520 U.S. 953 (1997) (rejecting a state-law based "replacement value" standard under Section 506(a) because "the Bankruptcy Code has reshaped debtor and creditor rights in marked departure from state law."); *Novak* v. *Callahan (In re GAC Corp.)*, 681 F.2d 1295, 1301 (11th Cir. 1982) (claims for punitive damages disallowed under Bankruptcy Act as matter of bankruptcy policy; if allowed, such claims would compel innocent creditors to pay for debtors' wrongdoing); *cf. In re Allegheny Int'l, Inc.*, 100 B.R. 247 (Bankr. W.D. Pa. 1989) (unmatured interest disallowed under Code Section 502(b)(2), even where parties attempt to override Code by provision in contract).

[37] *See, e.g., United States* v. *Camino Real Landscape Maint. Contractors, Inc. (In re Camino Real Landscape Maint. Contractors, Inc.)*, 818 F.2d 1503, 1507 (9th Cir. 1987) (the rate provided in the IRC "reflects tax objectives, not those of bankruptcy law"); *United States* v. *Neal Pharmacal Co.*, 789 F.2d 1283, 1287-89 (8th Cir. 1986); *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 481-82

5. The PBGC emphasizes its frustration with the overall bankruptcy process in attempting to convince this Court to review the decision of the court of appeals and adjust the treatment of the PBGC's UBL claim in bankruptcy. The PBGC finds fault with the pressure in a bankruptcy setting to compromise claims; the alleged double reduction of its termination claim as a function of determining the true economic value of the claim and the ultimate pro rata distribution to unsecured creditors; and the inherent legal and factual uncertainties in the process. Pet. 14, 16, 19-20. The PBGC fails to acknowledge, however, that similar frustrations are borne by all creditors. Government creditors are bound by the general rules applicable to all creditors. *See United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). The PBGC's desire for individualized rules uniquely applicable to the agency's bankruptcy claims are appropriately directed to Congress and do not raise issues meriting review by this Court.

(Bankr. E.D. Mich. 1995); *In re Mansfield Tire & Rubber Co.*, 152 B.R. 477, 484-85 (Bankr. N.D. Ohio 1993).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,
v.
REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

1. In its petition, PBGC identified two questions of vital importance to the pension insurance program—issues that constantly arise in the hundreds of bankruptcy cases in which PBGC is a creditor. The briefs in opposition do not dispute that decisions like the one below distort the economic incentives faced by financially distressed companies with underfunded pension plans. By permitting debtors to reduce dramatically their termination liability from the amount otherwise owing under nonbankruptcy law, Pet. 14-16, and by leaving them little or no incentive to comply with the minimum funding standard, Pet. 16-18, the decision below invites companies to follow CF&I's example and abandon their underfunded pension plans in bankruptcy, thus forcing PBGC to terminate their plans. The decision encourages financially troubled companies—

both those contemplating bankruptcy and those already in it—to shift their pension liabilities to the insurance system, and ultimately to other premium payers. The decision is also sharply at odds with principles of administrative law, with this Court's approach to harmonizing statutes, and with the precise language of ERISA and the Bankruptcy Code. Because of its far-reaching impact and potential for abuse, this decision has prompted the agency, for the first time in a decade, to petition this Court for review. *See PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

2. Amendments to PBGC's regulation on calculating termination liability do not make this case "obsolete." Brief for Debtors at 12; Brief for USWA at 20. Debtors explicitly concede that they "do not challenge" the regulation as an "improper construction of ERISA," but only whether it should be applied in bankruptcy. Brief for Debtors at 22-23. Similarly, the decision below was not based on the unreasonableness of any particular assumption in the regulation. Rather, it rested on the court's conclusion that no PBGC regulation on calculating termination liability, even if promulgated under an express delegation, could apply in bankruptcy. Under these circumstances, changes in the technical specifications of the regulation are irrelevant to the legal issue presented in this case.[1]

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[1] Respondents also misstate the effect of the 1993 amendment to this regulation, which was in large part a matter of presentation, intended to dispel "public confusion" and "enhance public understanding." 58 Fed. Reg. 50,812 (1993) (excerpt reprinted at Resp. App. 18a-19a). The preamble explained that the regulation's basic method remained the same: "[T]he amendment continues the regulation's historical approach of assigning values to annuity benefits that are in line with private sector group annuity prices, and the PBGC anticipates that, for most plans, this amendment will not significantly affect the valuations produced . . . ." Resp. App. 18a. The 1996 amendment was merely a "renumbering and reorganization" of PBGC regulations with no effect on substantive legal requirements. 61 Fed. Reg. 34,002 (1996).

3. The briefs in opposition reinforce the conclusion that this case presents fundamental questions at the intersection of administrative law and bankruptcy law. Respondents contend that legislative rules for calculating liability to an agency are presumed not to apply in bankruptcy, unless the agency's organic statute expressly so provides. *See* Brief for Debtors at 23; Brief for USWA at 22 n.32. Debtors attempt to distinguish *Batterton v. Francis*, 432 U.S. 416 (1977), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that PBGC does not "administer" the Bankruptcy Code, has no "expertise" in bankruptcy, and is therefore not entitled to "deference." Brief for Debtors at 21-22. By contrast, PBGC argues that the applicability of its regulation does not rest on judicial deference to the agency's expertise. Rather, its power to prescribe regulatory assumptions for computing liability flows from an express congressional delegation of legislative rulemaking authority. *See* 29 U.S.C. § 1301(a)(18); *Batterton*, 432 U.S. at 416-17 & n.9; *accord United States v. O'Hagan*, 117 S. Ct. 2199, 2217-18 (1997). Thus, the parties' briefs cleanly frame the important question whether bankruptcy courts have power to displace legislative regulations acknowledged to have the "force of law," Pet. App. 15a, under standards other than those set forth in the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A).[2]

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[2] *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), *see* Brief for USWA at 21-22, did not authorize bankruptcy courts to adjust the principal amount of a secured creditor's claim, but was limited to the allowance of postpetition interest on interest. 329 U.S. at 162-63. This subject is now addressed by a provision of the Bankruptcy Code. 11 U.S.C. § 506(b). *See Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1386 (11th Cir. 1990). In fact, "it was . . . one of the Code's innovations to narrow the occasions for courts to make valuation judgments . . . ." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle*

4. The briefs in opposition also confirm that the priority of PBGC's minimum funding contribution claim presents an issue worthy of certiorari. The case law on this question is considerably less coherent than the USWA portrays.[3] Brief for USWA at 12-13 & n.20. Respondents do not dispute that the cost of complying with a federal statute can be an administrative expense. Instead, they

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St. Partnership, 67 U.S.L.W. 4275, 4281 (U.S. May 3, 1999). Consistent with that approach, and in contrast to the court below, the Sixth Circuit recently held that *Vanston* did not permit a bankruptcy court to substitute its own discount factor, based on "general equitable principles," for an interest rate set forth in the non-bankruptcy law under which the claim arose. *Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 579 (6th Cir. 1998).

As for cases involving the statutory interest rate under 26 U.S.C. § 6621, Brief for USWA at 24, these decisions do not deal at all with determining the allowed amount of a claim under 11 U.S.C. § 502(b), but rather with determining the value of the bankruptcy estate's delayed payment of an allowed claim. 11 U.S.C. § 1129(a)(9)(C). Such "cram-down" cases, involving standards for confirming a plan of reorganization, have been characterized as "a distant cousin to the case before this Court." *Highland Superstores*, 154 F.3d at 580-81.

[3] The USWA cites two circuit opinions—dictum from a now reversed Second Circuit decision, *PBGC v. LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. at 656, and the majority of a divided panel of the Sixth Circuit, *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997). The USWA distinguishes a Ninth Circuit decision, *Wyle v. Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476, 479-80 (9th Cir. 1983), as arising under the Bankruptcy Act without explaining why that would make a difference in interpreting *Reading Co. v. Brown*, 391 U.S. 471, 483-85 (1968), which also arose under the Bankruptcy Act. And it fails to distinguish at all a proceeding in which both the bankruptcy court and district court explicitly adopted PBGC's basic reasoning—that minimum funding contributions accruing postpetition are a present cost of doing business. *In re Columbia Packing Co.*, 47 B.R. 126, 131 (Bankr. D. Mass. 1985), *aff'd*, 81 B.R. 205, 208-09 (D. Mass. 1988).

begin with the premise that the claim is "contractual," and then rely on cases holding that a contractual claim "arises" for purposes of bankruptcy when the "consideration" is furnished. Brief for USWA at 14-15; Brief for Debtors at 16-18. On the contrary, making minimum funding contributions to a pension plan is a statutory duty imposed by the Internal Revenue Code, 26 U.S.C. § 412, and ERISA, 29 U.S.C. § 1082, on employers who maintain pension plans, and is not a quid pro quo for employee labor.[4] The priority minimum funding claim arises solely from CF&I's continued sponsorship of the Plan postpetition without paying the statutorily required contributions. Indeed, had CF&I terminated the Plan before filing for bankruptcy, this priority claim would never have arisen at all, notwithstanding any labor that had been performed by CF&I's employees. Debtors suggest that the language of 11 U.S.C. § 507(a)(4)—granting priority to certain *pre*petition pension contributions—limits the priority to be accorded to *post*petition expenses. Brief for Debtors at 15-16. But this is not consistent with the language of 11 U.S.C. § 503(b), which is a nonexhaustive list of administrative expenses. *See* 11 U.S.C. § 503(b) (stating that "there shall be allowed administrative expenses, . . . including" the six categories of expenses there enumerated); 11 U.S.C. § 102(3) (stating that the term "including" is "not limiting"). Given the court of appeals' acknowledgment that "the employer must meet these [minimum funding] standards until its plan is terminated . . . ," Pet. App. 3a, this Court should decide the important and recurring question whether such statutory obligations are "costs ordinarily incident to operation of a busi-

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[4] *See LTV Steel Co. v. Shalala*, 53 F.3d 478, 496-98 (2d Cir. 1995) (rejecting argument that Coal Act contributions were "consideration" for employee labor); *UMWA 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1277 (10th Cir. 1998) (same).

ness . . . ," *Reading*, 391 U.S. at 483, and thus administrative expenses.

5. PBGC's 1998 surplus in the single-employer program, Brief for USWA at 4, is no reason for this Court to deny the petition. Business bankruptcy filings in 1998 stood at a 17-year low. *See The 1999 Bankruptcy Yearbook & Almanac* (Christopher M. McHugh ed., forthcoming June 1999) (manuscript at 10, on file with editor). Because of high investment earnings and low claims in this strong economy, the insurance program is currently in the black. 1998 PBGC Ann. Rep. 3, 9. The period before 1996, however, consisted of 21 consecutive years of deficits, including a $2.7 billion deficit in 1992—the year of the CF&I plan termination—and a $2.9 billion deficit in 1993.[5] *See* 1996 PBGC Ann. Rep. 1; 1992 PBGC Ann. Rep. 1; 1993 PBGC Ann. Rep. 1. As the GAO recently recognized, "the underfunding of a few large plans or underfunding in several plans in certain industries poses a long-term risk to PBGC solvency." GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving, but Long-Term Risks Remain 9 (1998). PBGC classifies the underfunding for plans of financially weak companies as "reasonably possible" exposure for purposes of its financial statements, as required by generally accepted accounting principles. As of December 31, 1997, PBGC's estimated "reasonably possible" exposure ranged from $15 billion to $17 billion—a signifi-

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[5] Debtors curiously assert that the existence of PBGC's "Early Warning Program"—a loss prevention program—somehow contradicts the proposition that bankruptcy is the main world in which the PBGC insurance fund operates. Brief for Debtors at 13-14 (citing 1998 PBGC Ann. Rep. 14 (excerpt reprinted at Resp. App. 14a)). On the contrary, a program for monitoring transactions that affect *ongoing* underfunded plans in no way conflicts with the fact that most of the liabilities against the PBGC insurance fund (i.e., from *terminated* pension plans) arise from the bankruptcies of plan sponsors. *See* Pet. 13-14.

cant risk in the event of a downturn. 1998 PBGC Ann. Rep. 11. The lengthy history of this case—nearly seven years in the making—illustrates why these questions should be decided now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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